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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where an employer has long maintained a collectively bargained program of benefits for former employees, which treats older employees more favorably than younger employees, may a court dissect the total program into parts and hold that one part, isolated from the remainder, discriminates against older employees under § 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA").

2. Whether a plan that exists and pays benefits fails to qualify as a "bona fide employee benefit plan" within the meaning of § 4(f)(2) of the ADEA because it lacks age-related cost factors; this same question is now pending before the Court in *Public Employees Retirement System v. Betts*, No. 88-389.

3. Whether an employer whose conduct at the time was not contrary to the law as then pronounced and applied by other federal courts may be held in "willful" violation of the ADEA.

PARTIES

Westinghouse Electric Corporation*

Equal Employment Opportunity Commission

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* Pursuant to Supreme Court Rule 28.1, Westinghouse lists below its parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates:

Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW)
Computer Aided Training Company, Incorporated
Eletrocontroles Villares, Ltda. (EVL)
Eletromar Industria Eletrica Brasileira, S.A.
Email Limited
Ercole Marelli & Company, S.p.A.
Escorts, Ltd.
Franco Tosi, S.p.A.
Galileo Uruguaya, S.A.
Industria IEM, S.A. de C.V.
Infrared Fiber Systems, Inc.
Integrated Communication Systems Inc.
Integrated Power Corporation
Maihak A. G. (H.)
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Mex Control S.A. de C.V.
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Mitsubishi Nuclear Fuel Co., Ltd.
Schneider S.A.
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Turbine Metal Technologies, Inc.
Tyree Industries Limited
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Vektron S.A.
W.S. Insulators
Westinghouse-Airship Industries, Inc.
Horizon International Television, Inc.
Harbinger*EDI Services, Inc.
Industrias Electronicas, S.A. (INDELEC)
Transformadores de Distribucion Trade, S.A. (TRADESA)

Westinghouse Electro Metalurgicas C.A. (WEMCA)
CMW Sistemas, Ltda. (CMWS)
CMW Equipamentos, Ltda. (CMWE)
China Industry Services Co., Ltd.
Elektrik Techizati Imalti Tesisati, A.S.
Hyosung Heavy Industries, Ltd.
IEM S.A.
Industry Services Company of Saudi Arabia, Ltd. (ISCOSA)
Korea Industry Services Co., Ltd.
Mitsubishi-Westinghouse Electric SGC, Ltd.
Transformadores TPL S.A.
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Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)
Electro—Fanal S.A.
Westinghouse, S.A. (WESA)
Iberatomica
Westinghouse Projectos Electricos, S.A. (WEPESA)
WEXICO Systems and Services, Ltd.
Westinghouse E-Mail, Ltd.
Cemac Westinghouse Pty. Ltd.
Contradores Electricos, C.A.
Westinghouse Saudi Arabia Ltd. (WSAL)
Westinghouse Motor Company

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No. ——

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Westinghouse Electric Corporation ("Westinghouse") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *Equal Employment Opportunity Commission v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir. 1989).

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 869 F.2d 696. The opinion of the United States District Court for the Eastern District of Pennsylvania (App., *infra*, 51a-102a) is reported at 632 F. Supp. 343.

JURISDICTION

The court of appeals initially entered its judgment on November 30, 1988. On December 14, 1988, Westing-

house filed a timely petition for rehearing and suggestion for rehearing in banc. On January 5, 1989, the court of appeals denied the suggestion for rehearing in banc. App., *infra*, 46a. On February 2, 1989, the court of appeals granted the petition for rehearing and entered its final judgment. App., *infra*, 47a-50a. The district court had jurisdiction under 29 U.S.C. § 626 and 28 U.S.C. § 1331; the court of appeals had jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The case involves §§ 4(a)(1) and 4(f)(2) of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §§ 623(a)(1) and 623(f)(2) (1982). These provisions are reproduced at App., *infra*, 103a.

STATEMENT

A. Westinghouse's Post-Employment Benefit Program: Its History And Development

Through collective bargaining, Westinghouse has for many years maintained a program to provide income maintenance to its employees after the termination of their employment. App., *infra*, at 8a-13a, 54a-59a. Essentially, in cases of plant closure or work relocation, this program provided that employees who satisfied certain requirements related to age, service, and circumstances of termination would be eligible for one of two basic benefits: immediate retirement benefits, or severance and deferred retirement benefits. *Id.*[1] Westinghouse and the

[1] The retirement benefits include immediate monthly pension benefits for life; monthly pension supplements until the onset of Social Security benefits; and lifetime insurance benefits. *See* App., *infra*, 23a; *see also* J.A. 1536, 1539-40, 1555. Deferred retirement benefits are monthly pension benefits for life commencing at age 65, or actuarially-reduced pension benefits for life commencing at an earlier age. J.A. 1537, 1559.

unions representing Westinghouse's employees have always intended and agreed that employees would be eligible for one or the other of these benefits, but not both. J.A. 515, 534-36, 1409-10. Westinghouse and the unions representing its employees have also always understood, and the court below accepted (App., *infra*, at 16a), that the value of the immediate retirement benefits provided to eligible employees at the time of their termination is greater than the combined value of the severance and deferred retirement benefits provided to other employees. J.A. 528-32, 999-1000, 2088-92.[2]

Westinghouse's collective bargaining agreements have linked pension and severance benefits since the first agreement to provide for severance benefits was negotiated in 1960. J.A. 568a, 1409-10. Prior to 1960, the only benefits available in cases of plant closure or work relocation were retirement benefits for those employees who had satisfied the normal age and service requirements of the retirement plan. J.A. 534, 539, 568a. In 1960, the agreements liberalized the criteria for receiving an immediate pension. J.A. 1785-86, 1792, 1794, 1798. They also, for the first time, provided severance benefits to employees who, when terminated through no fault of their own, were ineligible for immediate retirement benefits. J.A. 534-35, 1409-10.

With this linkage between immediate retirement benefits and severance benefits in place, Westinghouse and its employees' unions in negotiations after 1960 increased the benefits available under both the retirement and severance components. Concomitantly, they expanded the pool of employees eligible to receive the more valuable immediate retirement benefits by reducing the age and service requirements applicable in plant closure and re-

[2] Westinghouse has also provided its terminated management personnel with a benefit program that largely parallels the collectively bargained benefit program. App., *infra*, at 10a-11a, 13a, 60a-61a

lated situations. *See* App., *infra*, at 26a; *see also* J.A. 1765, 1720-21, 1704, 1696, 1598-99, 1344-46, 1324-27, 1302-06.

In 1982, Westinghouse and the unions gave all represented retirement-eligible employees, who were terminated through no fault of their own, the choice to elect immediate retirement benefits or severance and deferred retirement benefits—at their option. J.A. 1549-50, 1272-80. Thus, throughout the history of Westinghouse's post-employment benefit program, older employees have always been able to obtain the more valuable benefit package. J.A. 528-32, 999-1000.

B. The Proceedings In The District Court

In November 1983, the Equal Employment Opportunity Commission ("EEOC") filed this suit (J.A. 15-20), alleging that Westinghouse's post-employment benefit program at one location was in willful violation of the ADEA. After allowing amendments that converted the case into a nationwide action, the district court held that the "denial of severance pay to employees who take retirement is age-based discrimination." App., *infra*, at 85a. It further determined that the "bona fide employee benefit plan" exemption of § 4(a)(2) of the ADEA, 29 U.S.C. § 623(f)(2), did not protect Westinghouse's actions. *See* App., *infra*, at 89a-91a. Finally, it held that Westinghouse's violations were "willful" and accordingly awarded liquidated damages. *Id.* at 97a-100a.

C. The Decision Of The Court Of Appeals.

Westinghouse filed a timely appeal. The Third Circuit affirmed in part, reversed in part, and remanded for further proceedings. App., *infra*, at 1a-45a.

1. *The Holding That There Was Discrimination "Because of Age" Under § 4(a)(1)*

The court of appeals "accept[ed] Westinghouse's contention that the value of early retirement benefits is actuarially greater than or equal to the value of [sev-

erance benefits] plus a deferred pension. . . ." App., *infra*, at 16a. Nonetheless, the court ruled that, by conditioning receipt of severance benefits on ineligibility for or election not to receive immediate retirement benefits, Westinghouse had treated older employees unfavorably because of age. App., *infra*, at 16a-18a. Its reasoning was that older employees had received immediate retirement benefits only, whereas younger employees could receive "both severance benefits and retirement benefits (when they reached the required age)." *Id.* at 17a.

The court next ruled that the denial of severance benefits could not be justified by the fact that they were but one form of post-employment income being provided by an integrated benefit program. App., *infra*, at 19a-21a. The court acknowledged that "the severance pay and pension plans have been negotiated contemporaneously" and that "benefits under both were increased contemporaneously." *Id.* at 26a. But it concluded as a matter of law that "severance pay and pension benefits have distinctly different purposes," that "[p]ension benefits [cannot be] a substitute for severance pay," and that severance pay "is a fringe benefit" that is not an integral part of a retirement and pension package. *Id.* at 20a-21a.

The court further ruled that "[t]he 'additional benefit' provided by the [1982] option plans . . . [did] not eradicate" the age discrimination problem. App., *infra*, at 22a. It reasoned that "an older employee who [was] eligible for early retirement forfeit[ed] already vested benefits by choosing severance pay," while a younger employee who was ineligible for early retirement received severance benefits without forfeiting any retirement benefits. *Id.* The court acknowledged the contrary ruling on this latter point in *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (7th Cir. 1984), but declined to follow the Seventh Circuit's holding in that case. App., *infra*, at 24a-25a.

2. *The Rejection Of The § 4(f)(2) Defense*

The court next ruled that, despite the well-established bargaining history with respect to the Westinghouse benefit program, Westinghouse's plan was not an "employee benefit plan" within the meaning of § 4(f)(2) of the ADEA. App., *infra*, at 29a.[3] It stated that "[a] plan can be exempt under § 4(f)(2) either as an employee benefit plan that itself satisfies § 4(f)(2), or as an integral component of an employee benefit plan that satisfies § 4(f)(2)." *Id.* at 26a. But, based on its legal conclusion that "severance pay is a fringe benefit for which vested early or selected retirement benefits cannot be a substitute," the court found that the severance and pension provisions in issue were "not integral components of a comprehensive employee benefits scheme." *Id.* The court also held that the challenged provisions could not themselves qualify for § 4(f)(2)'s protection, since they did not "involve age-related cost factors." *Id.* at 27a.

3. *The Decision About Willfulness*

Finally, the court reversed the district court's judgment that Westinghouse had "willfully" violated the ADEA. App., *infra*, at 36a. The court rejected as "clearly erroneous" the findings upon which the district court had based its willfulness judgment. *Id.* at 30a-36a. But it nevertheless remanded to the district court to review the record again and "to reevaluate, in a manner consistent with this opinion, whether Westinghouse willfully violated the ADEA." *Id.* at 35a-36a. Judge Garth dissented, concluding that there was no basis for a finding of willfulness or for a remand. *Id.* at 36a-45a.

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[3] Section 4(f)(2) of the ADEA protects the actions of an employer who "observe[s] the terms of . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of [the Act.]" 29 U.S.C. § 623(f)(2). The court of appeals did not address whether Westinghouse's plan was "bona fide" or a "subterfuge."

REASONS FOR GRANTING THE WRIT

I. BY BREAKING WESTINGHOUSE'S POST-EMPLOYMENT BENEFIT PROGRAM INTO SEPARATE COMPONENTS AND ANALYZING THEM IN ISOLATION FROM ONE ANOTHER, THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, DISRUPTS LONG-ESTABLISHED COMPENSATION AND BENEFIT PRACTICES, AND INJECTS INTO THE ADEA QUALIFICATIONS NOT INTENDED BY CONGRESS.

The court below acknowledged that "the value of early retirement benefits is actuarially greater than or equal to the value of [severance benefits] plus a deferred pension. . . ." App., *infra*, at 16a. Nevertheless, the court concluded that older workers who received these more valuable early retirement benefits had been subject to adverse treatment within the meaning of the ADEA. *Id.* at 16a-18a.

Rather than looking at the program in the integrated manner in which it was negotiated, the court below dissected its key components. It justified this dissection based on its legal premise that pension benefits and severance benefits serve different purposes and cannot be a substitute for each other. This legal premise, however, conflicts with the decisions of other federal courts and inserts a standard in the ADEA not supported by either its plain language or its legislative history. It also conflicts with the well-established compensation practices of the federal government and numerous private employers and unions. If left undisturbed by this Court, the decision below will discourage employers and unions from providing severance benefit programs, which serve an important social purpose by moderating the impact of industrial dislocation. This Court's immediate review is therefore required.

A. The Decision Below Conflicts With Other Federal Courts And Condemns A Compensation Practice That Is Used By The Federal Government, Many Private Employers, And Unions.

1. *The Court's Decision Is In Conflict With Decisions Of Other Circuits.*

Unlike the decision below, other federal courts have rejected ADEA challenges to benefit plans that have integrated pension and severance benefits. The Third Circuit itself recognized (App., *infra*, at 24a-25a) that its decision relating to the option component of Westinghouse's 1982 program is in conflict with the decision of the Seventh Circuit in *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (1984).

The Third Circuit's decision on this issue also conflicts with the decision of the Fourth Circuit in *Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593 (4th Cir. 1985). That court rejected an ADEA challenge to a program that denied severance benefits to retirement-eligible employees unless they opted to defer receipt of their pension benefits. The Third Circuit attempted to distinguish *Britt* by noting (App., *infra*, at 24a) that *Britt* had purported to distinguish the Third Circuit's earlier decision in *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984), on the ground that one case involved "severance pay" while the other involved only a "wage substitute" (768 F.2d at 595). However, this is no distinction at all. Both courts were confronted with the question whether linking retirement benefits and non-retirement benefits is prohibited under the ADEA. The two circuits resolved that question very differently and thus are in conflict on the issue presented here.

Similarly, the Third Circuit's decision as to both the pre- and post-1982 programs conflicts with the judgments of other federal courts. *See, e.g., Abenante v. Fulflex, Inc.*, 701 F. Supp. 296 (D.R.I. 1988), *appeal pending*, No. 87-0456-B (1st Cir.); *Khan v. Grotnes Metalforming*

Systems, 679 F. Supp. 751 (N.D. Ill. 1988); *see also Patterson v. Independent School Dist. #709*, 742 F.2d 465, 467 n. 3 (8th Cir. 1984); *EEOC v. Firestone Tire & Rubber Co.*, 650 F. Supp. 1561, 1567-68 (W.D. Tenn. 1987). Indeed, the first district court to apply the decision below explicitly stated that it would have held to the contrary were it not bound to follow the law of the Third Circuit. *See EEOC v. USX Corp.*, No. 87-6044, 1989 U.S. Dist. LEXIS 2943 (E.D. Pa. Mar. 23, 1989).

2. *The Court's Decision Is Contrary To And Will Adversely Impact Long-Established Compensation Practices.*

The rule adopted by the court below, in a nationwide case, does violence to long-standing compensation practices that have been established by a myriad of private and public sector employers and unions. Indeed, many private and public sector employers, including the federal government, have long maintained post-employment benefit programs that link eligibility for severance benefits to ineligibility for or a reduction in pension benefits.

Congress, for example, has expressly proscribed the payment of severance benefits to federal employees who are entitled to immediate civil service retirement benefits. *See* 5 U.S.C. § 5595(a)(2)(iv) (1983).[4] Moreover, surveys indicate that approximately 45 percent of the private collectively-bargained benefit plans imposing restrictions on receipt of benefits deny severance benefits to employees who are eligible for pensions. *See Basic Patterns: Income Maintenance*, Collective Bargaining Negotiations and Contracts (BNA) No. 167, at 53:4 (Apr. 24, 1986). It is well recognized that employers usually in-

[4] Other federal statutes contain similar provisions. *See* 10 U.S.C. § 1186(b)-(c) (1983) and 10 U.S.C. § 1174(e), (h) (1983 and Supp. 1986) (officers and enlisted members eligible for voluntary retirement from active military service not entitled to separation pay); *see also* 14 U.S.C. §§ 286(b), 286a(d), and 327(b) (1983 and Supp. 1986); 33 U.S.C. § 853h(e) (Supp. 1986).

corporate "safeguards" in severance plans that include provisions that "severance pay is not payable if an employee retires on pension." *Industrial Relations Guide* (P-H) ¶ 53,458 (1986). Significantly, such plans exist in a broad range of industries and, in many cases, are the product of collective bargaining.[5]

The decision below will inevitably cause a serious disruption and erosion of these widely-used benefit integration practices. Employers, unions, and plan administrators now face significant liabilities to employees who are the recipients of the more valuable benefits under these integrated benefits packages.

In the face of such unanticipated and costly liabilities, employers, unions, and plan administrators, who establish and manage nationwide plans and thus are concerned with legal certainties, will have no choice but to alter their existing benefit programs to ensure that they can satisfy the arbitrary standard of the Third Circuit. Given the nationwide scope of such programs—as demonstrated in this case—the Third Circuit's ruling has ramifications far beyond that court's geographical bound-

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[5] The EEOC has, for example, already litigated the lawfulness of various kinds of pension severance benefit programs, including collectively bargained programs, in the dairy, rubber, grocery, and steel industries. It also has initiated challenges to, and is currently litigating the lawfulness of, plans in the communications, meat packing, food, automotive, electrical, and petroleum industries. *See EEOC Summary of Age Discrimination Lawsuits Filed in FY 1988*, *Daily Labor Report*, No. 251, at D-1 (Dec. 30, 1988); *Report on the Operations of the Office of General Counsel, Equal Employment Opportunity Commission*, October 1986 through September 1987, at Appendix C (July 11, 1988); *Report on the Operations of the Office of General Counsel, Equal Employment Opportunity Commission*, October 1985 through September 1986, at Appendix A (Mar. 31, 1987). Such litigation creates untenable nationwide uncertainty as to what can be negotiated in post-employment benefit programs and the cost of such programs.

aries and will require the alteration of benefit programs that other courts would otherwise approve.

These alterations will mean (1) fewer severance benefit programs, if employers have to provide to an employee both severance and immediate pension benefits, and (2) a reduction in the number of individuals who will be made eligible for immediate retirement benefits in lieu of existing severance benefit opportunities. If additional funds are spent on providing severance benefits for retirement-eligible employees, the amount of funds available to increase pension benefits will be reduced. Thus, fewer benefits will be paid to those employees who are perceived by employers and unions as having the greatest need.

Finally, the decision below seriously disrupts the collective bargaining process and severely limits the ability of employers and unions to provide comprehensive safety nets for all employees. The Third Circuit's decision is a radical departure from how employers and unions have traditionally negotiated post-employment benefit programs and will bring confusion and uncertainty into the bargaining arena. Indeed, the Third Circuit's decision effectively forecloses an employer and union from tailoring a post-employment benefit package to satisfy the particular needs of the bargaining unit employees. This Court's immediate review is, therefore, necessary to prevent these serious and counterproductive effects.

B. The Decision Below Is Contrary To The Principles And Policies That Guided Congress In Enacting The ADEA.

On the merits, the decision below is plainly wrong. It rests on a legal premise that the distinct nature and purpose of pension and severance benefits precludes their integration. This premise not only ignores the bargaining history of the parties, but more importantly imposes

obligations beyond the specific language of the statute and is contrary to the principles and policies that guided Congress in enacting the ADEA.

The ADEA does not prescribe what benefits should be provided employees or the structure that employers and unions should use in designing benefit programs. To be sure, § 4(a)(1) of the ADEA prohibits an employer from providing less "compensation" to an individual because of his or her age. *See* 29 U.S.C. § 623(a)(1). But it does not prohibit an employer from providing equal or greater "compensation" to an older individual through an integrated package of benefits.

The court below thus erred when it found a violation of the ADEA because Westinghouse provided older employees more valuable retirement benefits instead of less valuable severance benefits. Westinghouse and the unions representing Westinghouse employees were free to determine how much more older employees would receive under the post-employment benefit program.

1. *Congress Did Not Intend To Prohibit The Integration Of Severance Benefits And Pension Benefits.*

There is no reason to read into the language of § 4(a)(1) a limitation or standard that Congress did not itself write. Congress simply did not intend the prohibition against discrimination in "compensation" to preclude the integration of pension and severance benefits. Contrary to the holding of the Third Circuit, the ADEA does not preclude employers and unions from linking pension benefits to severance or other benefits to form an integrated benefit package.

As noted above (*see supra* at 9), Congress has itself expressly proscribed the payment of severance benefits to federal employees who are entitled to immediate civil service retirement benefits. Many of these proscriptions pre-existed the enactment of the ADEA and its extension

to federal employees in 1974. At no time has Congress suggested that the proscriptions on payment of severance benefits to retirement-eligible federal employees constitute adverse treatment on the basis of age. Thus, to interpret § 4(a)(1) to preclude such practices would require the Court "to conclude that Congress itself has repeatedly flouted its own declaration of policy." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 90 (1973). The Court has said that it will not "lightly find such a breach of faith." *Id.* at 90-91.

Moreover, the legislative history of the ADEA indicates that Congress did not want to disrupt existing employee benefit plans and that it intended generally to address problems of age discrimination in benefit plans in separate legislation. *See United Air Lines v. McMann*, 434 U.S. 192, 195-203 (1977). Congress addressed the issue of employee benefit plans in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, which was proposed contemporaneously with the ADEA and which was expressly referenced in the ADEA's legislative history. *See* 113 Cong. Rec. 7076 (Mar. 16, 1967), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 71. In enacting ERISA, Congress was "very much aware that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 69 (1974), *reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974* 3115, 3189 (1976).

This Court has also recognized the appropriateness of benefit integration. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the Court held that an employee's pension may be reduced by the amount of any workers' compensation award received. Subsequently, the federal courts have consistently ruled that ERISA permits—and, indeed, encourages—the integration of pen-

sion and severance benefits. *See, e.g., Vintilla v. United States Steel Corp. Plan for Employee Pension Benefits*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 475 U.S. 1141 (1986), *aff'g mem.* 606 F. Supp. 640 (W.D. Pa. 1985); *Spitzler v. New York Post Corp.*, 620 F.2d 19 (2d Cir. 1980).

Congress could not have intended § 4(a)(1) to defeat the policies and practices of the statute that it simultaneously said would govern employee benefit-related matters.

2. *The Court Below Analyzed The Westinghouse Post-Employment Benefit Program Contrary To Well-Established Judicial Principles.*

Because Congress intended to preserve labor-management discretion and business prerogative, this Court has repeatedly held that, absent specific contrary direction, it must assume that Congress intended for issues of employment discrimination to be evaluated in the context of the overall program or policy at issue. *See Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (lawfulness of affirmative action program turns on purpose and effect of plan as a whole); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (rule requiring employee to work 45 weeks to be considered "permanent" must be treated as part of "seniority system" of which it was intended to be a part). For this reason, in Title VII cases, the courts of appeals have consistently held that it is improper to isolate the purpose or effect of components of employment programs that were not intended to operate apart from each other. *See, e.g., Women in City Gov't United v. City of New York*, 563 F.2d 537, 540-41 (2d Cir. 1977); *Guse v. J.C. Penney Co.*, 562 F.2d 6, 8 (7th Cir. 1977).

This basic principle of discrimination analysis applies to cases under the ADEA as well. *See Arnold v. United States Postal Serv.*, 863 F.2d 994, 999-1000 (D.C. Cir. 1988) (rejecting challenge to one component of an integrated

transfer policy); *EEOC v. Air Line Pilots Ass'n*, 661 F.2d 90, 93-94 (8th Cir. 1981) (rejecting challenge to one provision of a vacation leave policy). As the D.C. Circuit stated in *Arnold*: "it is neither fair nor reasonable to judge the motives of the [employer] by uncoupling the rule [challenged under the ADEA] from the other aspects of what was clearly intended to be an integrated program." 863 F.2d at 1000.[6]

The manner in which the court below analyzed this case was to dissect the components of a post-employment benefit program that were intended and designed to operate together as an integrated whole. It split off the severance component from the retirement component and then, averting its gaze from favorable treatment of older employees and looking at the severance benefits in isolation, characterized the severance component as discriminatory against older employees. This is unrealistic and inconsistent with the above-stated principles.

The decision of the court below, which wrenches the severance benefit provision from the benefit program of which it was intended to be an inseparable part, conflicts with these judicially accepted principles of discrimination analysis and cannot be allowed to stand.

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[6] Importantly, the Department of Justice filed the appeal in the *Arnold* case on behalf of the Postal Service, with the authorization of the Solicitor General. The Justice Department urged the D.C. Circuit to rule, as it did, that an integrated employment policy may not be "balkanized" into its constituent parts in order to establish a claim of disparate impact or disparate treatment. The EEOC's position in the court below is thus inconsistent with the position that the Solicitor General has authorized the Justice Department to take on behalf of an agency of the United States. For the Court's convenience, petitioner has reprinted the relevant portions of the Justice Department's *Arnold* brief in the Appendix to this petition. App., *infra*, at 104a-119a.

II. THE THIRD CIRCUIT'S DECISION THAT ONLY PLANS REFLECTING AGE-RELATED COST FACTORS QUALIFY FOR PROTECTION UNDER § 4(f)(2) OF THE ADEA CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND IMPOSES A STANDARD NOT INTENDED BY CONGRESS.

The second question that this petition presents concerns whether § 4(f)(2) of the ADEA—which makes it lawful for an employer to observe the terms of "any bona fide employee benefit plan[,] such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes" of the ADEA (29 U.S.C. § 623(f)(2))—protects only those plans that reflect age-related cost factors. This question, which is also raised in *Public Employees Retirement System v. Betts*, No. 88-389 (U.S. argued Mar. 28, 1989), plainly warrants this Court's immediate review.

The courts of appeals are in direct conflict concerning whether § 4(f)(2) of the ADEA protects only those plans that reflect age-related cost factors. The Sixth Circuit, like the court below (App., *infra*, at 27a-28a), has concluded that § 4(f)(2)'s coverage extends only to those plans where the cost of providing the benefit in issue increases with age. *See Betts v. Hamilton County Bd. of Mental Retardation*, 848 F.2d 692, 694 (6th Cir. 1988), *prob. juris. noted*, No. 88-389 (U.S. argued Mar. 28, 1989); *see also Karlen v. City Colleges*, 837 F.2d 314, 319 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988).

The Fifth Circuit, in contrast, has twice declined to limit § 4(f)(2) to plans that have such age-related cost justifications. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 216-17 (5th Cir. 1974) (profit-sharing retirement plan); *Alford v. City of Lubbock*, 664 F.2d 1263, 1268-70 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (defined contribution pension plan). The Second Circuit agrees. *See Cipriano v. Board of Educ.*, 785 F.2d

51, 54-55 (2d Cir. 1986) (age-related cost factors do not determine whether a plan is a "bona fide employee benefit plan" within the meaning of § 4(f)(2)). The Ninth and Tenth Circuits have also held that an age-related cost justification is not the exclusive means of establishing that the § 4(f)(2) defense applies. *See EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988) (age-related cost justification not necessary for plan that pre-dates passage of the ADEA); *EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988) (same).

This Court acknowledged the significance of this inter-circuit conflict, and the importance of the issue that underlies it, when it noted probable jurisdiction in *Betts*. The age-related cost justification theory on which the Sixth Circuit relied in *Betts* is likewise central to the Third Circuit's decision to deny § 4(f)(2)'s protection to the challenged components of Westinghouse's benefit program. To be sure, the instant case involves pension and severance benefits rather than disability and age and service retirement benefits (as in *Betts*). But the legal issue that the case presents—whether § 4(f)(2) applies only to plans that reflect age-related cost factors—is no different from the question presented in *Betts*, and certainly no less important.[7]

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[7] While the court below suggested (App., *infra*, at 26a) that a plan could qualify for § 4(f)(2)'s protection even if it did not itself reflect age-related cost factors, it made clear that it could do so only if it was an integral part of a plan that had such age-related cost factors. Thus, the legal question presented in *Betts* is common to both grounds of the decision below.

In any event, in analyzing this issue, the court below simply repeated its assertion that severance and pension benefits cannot, as a matter of law, be integrated. App., *infra*, at 26a-27a. Indeed, it did so while holding that even Westinghouse's "pension plans are not exempt under 29 U.S.C. § 623(f)(2)" (*id.* at 29a), as well as violate § 4(a)(1). But this assertion and holding find no support in the practices of the parties or the statute; they conflict with the decisions of other courts. *See, e.g., Patterson v. Independent School Dist. #709*, 742 F.2d 465 (8th Cir. 1984).

The Court may, of course, resolve in *Betts* the question whether § 4(f)(2) protects only those types of plans that reflect age-related cost factors. If so, the Court should dispose of that aspect of this petition as is appropriate in light of its decision in *Betts*. If not, however, plenary review of this issue is essential: as explained in detail in the various briefs filed in *Betts*, most of the nation's established benefit programs cannot justify their age-related benefit variances by reference only to age-related cost factors. This Court's review is necessary both to resolve the confusion that now exists concerning whether § 4(f)(2) protects these programs and to restore the certainty that is critical to these programs' effective operation.[8]

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[8] The Third Circuit's characterization of severance benefits as "fringe benefit[s]" (App., *infra*, at 26a) does not remove them from § 4(f)(2)'s protection. First, this Court has recognized that severance benefit plans are employee benefit plans under ERISA. *See Massachusetts v. Morash*, 57 U.S.L.W. 4429 (U.S. Apr. 18, 1989); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211, 2220-21 (1987); *Roberts v. Burlington Industries*, 477 U.S. 901 (1986), *aff'g mem. sub nom. Holland v. Burlington Industries*, 772 F.2d 1140, 1145 (4th Cir. 1985); *Roberts v. Burlington Industries*, 477 U.S. 901 (1986), *aff'g mem. sub nom. Gilbert v. Burlington Industries*, 765 F.2d 320, 325 (2d Cir. 1985). Second, nothing in § 4(f)(2) or its legislative history confines the term "employee benefit plan" to a "retirement, pension, or insurance" plan. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 216-17 (5th Cir. 1974) (profit-sharing plan). The term "any" in § 4(f)(2) makes the exemption comprehensive in scope (*see Harrison v. PPG Industries*, 446 U.S. 578, 587-89 (1980)); the phrase "bona fide" means only that a plan "'exists and pays benefits'" (*see United Air Lines v. McMann*, 434 U.S. 192, 194 (1977)); the phrase "employee benefit" refers to virtually any form of compensation that is in a form other than direct wages and is paid in whole or in part by an employer—i.e., to any "fringe benefit" (*Fundamentals of Employee Benefit Programs* 2 (Employee Benefit Research Institute, 3d ed. 1987)); and the term "plan" refers to severance plans, similar to the one presented in this case, provided pursuant to an on-going administrative benefit program (*see Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2216-21).

III. THE THIRD CIRCUIT'S DECISION THAT WESTINGHOUSE MAY BE DEEMED TO HAVE "WILLFULLY" VIOLATED THE ADEA IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985), this Court held that an employer's ADEA violation is "willful" only if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Under this standard, an employer who acts "reasonably and in good faith" in determining its legal obligations does not act "willfully" for purposes of the ADEA. 469 U.S. at 129. Indeed, as this Court made clear in *McLaughlin v. Richland Shoe Co.*, 108 S. Ct. 1677, 1682 n. 13 (1988), an employer does not act "willfully" even if it "acts unreasonably, but not recklessly, in determining its legal obligation."

Accordingly, the courts of appeals have concluded that, where other courts have upheld the legality of a challenged practice, a "willful" violation cannot, as a matter of law, be found; in such circumstances, it is not possible to find that the employer knew that, or did not care whether, its actions violated the ADEA. *See Whitfield v. City of Knoxville*, 756 F.2d 455, 464 (6th Cir. 1985); *EEOC v. Madison Community Unit School Dist. No. 12*, 818 F.2d 577, 585-86 (7th Cir. 1987); *see also EEOC v. Westinghouse Electric Corp.*, 646 F. Supp. 555, 562-63 (D.N.J. 1986), *appeal pending*, No. 87-5174 (3d Cir. argued Oct. 20, 1987). The Third Circuit's decision cannot be reconciled with these decisions.

As explained above, the federal courts are divided concerning whether, as Westinghouse argued to the courts below, § 4(a)(1) of the ADEA allows an employer to maintain an integrated benefits program that provides the greater of retirement or severance (and deferred pension) benefits to terminated employees. *See supra*, at 8-9. They are also divided concerning whether, as West-

inghouse argued to the courts below, § 4(f)(2) of the ADEA protects such a program, even though neither it nor its components reflect age-related cost factors. *See supra*, at 16-17.

Indeed, the court of appeals agreed with Westinghouse that it had not acted contrary to existing legal authority and acknowledged that Westinghouse had initially persuaded a district court that § 4(f)(2) protected its plans. *See EEOC v. Westinghouse Electric Corp.*, 577 F. Supp. 1029 (D.N.J. 1982), *rev'd*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984), *on remand*, 646 F. Supp. 555 (D.N.J. 1986), *appeal pending*, No. 87-5174 (3d Cir. argued Oct. 20, 1987). While the Third Circuit reversed that decision, it did so on the basis of the very theory—the age-related cost justification theory—that at least four Justices have agreed in *Betts* is sufficiently controversial to merit this Court's review. In these circumstances, it is legally impossible to find that Westinghouse knew that, or did not care whether, its actions violated the ADEA.

The contrary judgment of the court of appeals, reflected in its order remanding this issue to the district court for further proceedings, rests on the view that, notwithstanding the unsettled state of the law, an employer may still be held in "willful" violation of the ADEA for maintaining these benefit programs. *See* App., *infra*, at 29a-36a. This view, however, is inconsistent with the view of this Court and other federal courts—to wit, that an employer does not knowingly or recklessly violate the ADEA when, after considering its legal obligations, it refuses to capitulate to rulings with which not all informed members of the legal community have agreed. *See McLaughlin v. Richland Shoe Co.*, 108 S. Ct. at 1682; *Whitfield v. City of Knoxville*, 756 F.2d at 464.

Because the court of appeals' decision on willfulness so conflicts with decisions of this Court and other courts of appeals, review should extend to this as well as the other

two questions presented. Indeed, the willfulness decision is so patently wrong that, absent plenary review of this case, the Court should summarily reverse this portion of the judgment below in order to restore clarity and uniformity to the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION
Appellant

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civil Action Nos. 83-5457 and 84-4799)

Argued October 20, 1987
Before: HIGGINBOTHAM, SCIRICA and
GARTH, *Circuit Judges*

(Filed February 2, 1989)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

This appeal arises from an action brought by the Equal Employment Opportunity Commission against Westinghouse Electric Corporation, based on the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1982). The EEOC alleges that Westinghouse's 1979

and 1982 pension and severance pay policies,[1] discriminate based on age. After a bench trial, the district court found that Westinghouse's plans discriminate based on age, and that Westinghouse willfully violated the ADEA. Westinghouse appeals from that decision.

In our review, we must determine whether Westinghouse's 1979 pension and severance pay plans, denying severance pay to retirement-eligible employees who are terminated or laid off, violate § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1). We must also decide whether Westinghouse's 1982 pension and severance pay plans, which allow retirement-eligible, involuntarily terminated employees to elect either severance pay or retirement benefits, but not both, violate 29 U.S.C. § 623(a)(1). We hold that under both plans, retirement-eligible employees are treated less favorably than their younger counterparts with respect to their ability to receive severance pay. Because retirement eligibility under the Westinghouse plans is inseparably linked with age, the discriminatory treatment is based on age. Therefore, both the 1979 and 1982 plans violate the ADEA.[2]

We must also address Westinghouse's claim that its severance pay plans are exempt from ADEA coverage

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[1] The term severance pay plan refers to the 1979 Layoff and Income Benefits Plan ("LIB") and the 1982 Employee Security & Protection Plan ("ES&P"), which cover non-management employees; and to the Management Separation Allowance Program ("MSA"), which covers management personnel.

Westinghouse revised its pension and LIB plans in 1982 ("1982 plans"), and its MSA plan in 1985, to provide employees with an option to receive either severance pay or retirement benefits.

[2] Westinghouse contends that a *prima facie* case of age discrimination was not established. That issue, however, is "subsumed on appeal into whether the plaintiff has sustained . . . [its] ultimate burden of proving that age was a determinative factor in the plaintiff's termination." *Dreyer v. Arco Chemical Co., Div. of Atl. Richfield*, 801 F.2d 651, 654 (3d Cir. 1986). *See also Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 257 (3d Cir. 1986).

under § 4(f)(2), 29 U.S.C. § 623(f)(2). Because those plans are not part of an integrated employee benefit scheme that satisfies § 4(f)(2) and do not involve age-related cost factors, we reject Westinghouse's § 4(f)(2) defense.

Finally, we must decide whether the district court erred in concluding that Westinghouse willfully violated the ADEA. We will remand to the district court to re-evaluate willfulness because: (1) some of the factors relied upon by the district court do not support its finding of willfulness, and (2) the court did not consider separately the 1979 plans and the 1982 plans when making its determination on willfulness.

I. *Proceedings*

In November, 1982, Charles Slackway, age 62, a former employee at Westinghouse's Lester, Pennsylvania facility, filed a charge of age discrimination with the EEOC. Slackway claimed that unlike younger employees, he was denied severance pay when he was laid off. *See* J.App. at 1952. In June, 1983, the EEOC issued a letter of violation to Westinghouse, concluding that Westinghouse discriminated against Slackway (and others named and/or yet to be named) in violation of 29 U.S.C. § 623(a)(1). The letter stated that the Commission, in accordance with its statutory mandate,[3] sought voluntary compliance with the ADEA through informal methods of conciliation. J.App. at 1971.[4]

Evidently, efforts at conciliation proved fruitless and the EEOC filed its original complaint on November 10, 1983, pursuant to 29 U.S.C. § 626(b). The EEOC alleged

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[3] *See* 29 U.S.C. § 626(b).

[4] Before instituting this lawsuit, the EEOC issued four more letters of violation to Westinghouse, each time stating EEOC's continued interest in conciliation, but indicating that if Westinghouse continued to ignore its efforts, the case would be referred to the legal unit for possible litigation. J.App. at 1974-81.

that Westinghouse willfully engaged in unlawful employment practices at its Lester, Pennsylvania facility, in violation of 29 U.S.C. § 623(a)(1), by failing to provide Layoff and Income Benefits (LIB) to employees age sixty or older who were terminated or laid off and were eligible for, and/or had received, early retirement benefits under Westinghouse's pension plan. The complaint identified thirty-five aggrieved employees and included all others similarly situated. J.App. at 15.

EEOC filed its first amended complaint on August 23, 1984, expanding the action to include Westinghouse's Concordville, Pennsylvania facility. That complaint identified 126 aggrieved employees, included others yet to be named, and contained allegations of additional unlawful employment practices: (1) denying LIB to employees laid off prior to July, 1982 who were eligible for any type of retirement benefit; (2) giving employees who were laid-off after July, 1982, the option of selecting either LIB or retirement, but not both; (3) forcing laid-off employees to retire prior to age seventy because LIB was not available; (4) denying early retirement to laid-off employees who chose LIB; (5) denying recall work to employees who were laid off and forced to retire; and (6) giving lower retirement benefits to laid-off employees who were not eligible for retirement because of their age at the time of the layoff, but who later became qualified for retirement benefits.

In October, 1984, the EEOC filed a second amended complaint, expanding its prior claims by alleging that Westinghouse engaged in those unlawful employment practices in all of its facilities nationwide. The employment practices were alleged to have begun at least as early as 1980, and to have continued through the time of filing of each of the complaints. The EEOC also filed a new collateral complaint containing the same nationwide allegations. The district court ordered that the cases be consolidated and tried jointly.

Following trial, the district court issued its opinion,[5] in which it held: (1) that Westinghouse's 1979 employee pension, and severance pay plans, which denied severance pay to employees who take retirement, discriminated based on age, in violation of 29 U.S.C. § 623(a)(1); (2) that Westinghouse's 1982 employee pension and severance pay plans, which provide laid-off employees with an option between severance pay and pension benefits, discriminate based on age in violation of 29 U.S.C. § 623(a)(1); and (3) that Westinghouse willfully violated the ADEA.[6]

With respect to both plans, the district court found that because receipt of severance pay is conditioned on non-retirement status, laid-off workers are treated differently on the basis of age. The court stated that "(a)ge and retirement are, in fact, so closely linked that a criterion based on one is a criterion based on the other." 632 F. Supp. at 367. In evaluating Westinghouse's plans, the district court did not consider separately the 1979 and 1982 plans. However, the court found that the option provided by the 1982 plans does not give employees a practical choice, because selection of LIB instead of retirement requires forfeiture of insurance and medical benefits. Therefore, the court concluded, for all practical purposes there is no difference between the 1982 plans and the 1979 plans. In any event, the court held that provid-

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[5] *EEOC v. Westinghouse Elec. Corp.*, 632 F. Supp. 343 (E.D. Pa. 1986).

[6] The EEOC's charges implicated several other Westinghouse plans and practices: (1) Advanced Retirement Plan I & II; (2) an "impact number" process by which special benefits are awarded to certain employees who are laid off because of product-line relocation, job movement or location shutdown; (3) limiting retirement benefits to employees who are actually eligible when laid off; and (4) limiting death-prior-to-retirement benefits to spouses of deceased employees who were actually eligible for retirement benefits at the time of death. *See* 632 F. Supp. at 351. The district court held that these plans and practices do not violate the ADEA because they were bona fide pension and seniority arrangements. *Id.* at 369-71. Those rulings are not challenged on appeal.

ing an option does not cure the violation because older employees still cannot receive both pension and severance pay. The option is merely a "sham to prolong the litigation of this issue." *Id.* at 366 n.12.

The district court also rejected Westinghouse's assertion that its programs have a legitimate, non-discriminatory purpose. Westinghouse's justification was a purported corporate policy against double-dipping; that is, it would not provide more than one type of benefit to a laid-off employee in order to insure that all laid-off employees received some type of post-employment benefit. The court termed this argument inconsistent, noting that under the various severance pay plans, some employees can receive more than one type of post-employment benefit. For example, a laid-off employee age fifty-nine with more than ten, but less than thirty years of service, can receive LIB until age sixty, at which point he can take early retirement. *See* 1979 LIB plan at 4; 1982 ES&P plan at 7 (J.App. at 1806, 1817). Furthermore, the court held, the unstated premise of the no double-dipping rationale—that severance pay and pension benefits are fungible—is incorrect. Severance pay is a short-term fringe benefit that allows a laid-off employee to cope with the layoff and to seek new employment. Pension benefits, on the other hand, provide for long-term retirement. The two have distinctly different purposes: "Pension benefits are not a substitute for severance pay." 632 F. Supp. at 367.

Next, the district court rejected Westinghouse's defense under § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), which exempts from the ADEA's coverage bona fide employee benefit plans that are not a subterfuge to evade the purposes of the Act. The court found that severance pay is not a bona fide employee benefit plan because it is a fringe benefit and not an integral part of Westinghouse's pension plans. Alternatively, the court held that even if severance pay is part of a bona fide employee benefit plan, Westinghouse did not establish that its plan

was not a subterfuge to evade the purposes of the ADEA, as required by 29 U.S.C. § 623(f)(2). Although Westinghouse's severance pay plan was in existence prior to the enactment of the ADEA, the court noted that since passage of the ADEA, Westinghouse's plans have undergone negotiation, adjustment and reaffirmation. It found that reaffirmation of prior discriminatory practices amounts to evasion of the ADEA and is a subterfuge to evade its purposes. 632 F. Supp. at 368.

Finally, the district court held that Westinghouse willfully violated the ADEA. The court said that Westinghouse: (1) stubbornly resisted compliance with the ADEA, (2) ignored judicial invalidations of policies similar to its own, (3) belatedly invented a corporate policy against double-dipping to justify its unwillingness to comply, and (4) made a "good faith" argument—that the 1979 plan was designed before enactment of the ADEA, and that the 1982 plan was designed in reliance on statements made by EEOC counsel in another litigation[7]—that was transparent and incredible.

In order to decide the issues presented in this case, we must examine Westinghouse's pension and severance pay plans.[8]

II. *The plans*

A. *1979 pension plan*

The 1979 version of Westinghouse's pension plan provided for "normal," "deferred," "early," or "selected" re-

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[7] In 1980, the EEOC filed suit against Westinghouse in the District of New Jersey, alleging that Westinghouse violated 29 U.S.C. § 623(a) by failing to provide LIB to employees eligible for early retirement under the Westinghouse pension plan. *See EEOC v. Westinghouse Elec. Corp.*, 577 F. Supp. 1029 (D.N.J. 1982), *rev'd*, 725 F.2d 211 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984).

[8] Only those Westinghouse post-employment policies that are implicated in this appeal are discussed. For a description of Westinghouse policies that were challenged at trial but not on appeal, *see* 632 F. Supp. at 354-56.

tirement. Normal retirement occurred at age sixty-five, after five years of service. However, an eligible employee could defer retirement until age seventy. Also, certain employees could take early retirement before age sixty-five (normal retirement age). Depending on the years of service, an employee could retire at specified ages between fifty and sixty. There were four "early retirement" subcategories, three of which concerned early retirement after layoff. Those three subcategories provided that a laid-off employee who had received lump-sum severance pay was ineligible for early retirement. *See* J. App. at 1598-99.

Selected retirement under the 1979 plan contained two subcategories. Under the first subcategory, an employee with at least thirty years of service could choose selected retirement when he was between fifty-eight and sixty-five years of age. The second subcategory concerned selected retirement after layoff. An employee laid off because of a location closedown, or a job movement or product-line relocation after August 1, 1979, was eligible for selected retirement if he was between fifty and sixty years of age, had at least thirty years of service, and did not receive lump-sum severance pay.

B. *LIB: 1979 separation benefits plan for non-management personnel*

After layoff, certain non-management employees could receive separation benefits termed "Layoff and Income Benefits" ("LIB"). Eligibility for LIB was determined by two or more full years of service and, most important for our inquiry, by non-entitlement to early or selected retirement benefits under the Westinghouse pension plan.[9] *See* Article VI, § 1 (a) of 1979 LIB plan (J.App. at 1302, 1805).

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[9] Employees who are eligible for early or selected retirement are referred to as "retirement-eligible employees."

An eligible employee could receive LIB in one of several forms. If management thought that the layoff would exceed six months, the employee could receive the maximum allowable sum in a lump-sum payment. An employee who chose a lump-sum payment permanently severed his relationship with Westinghouse and relinquished any recall rights or credits for years of service with the company (with the exception of his rights, if any, under the pension plan). J.App. at 1303, 1304; J.App. at 1805, 1806. Alternatively, an eligible employee who wanted to retain recall rights and service credits (*see* J.App. at 1304; J.App. at 1806) could apply for weekly benefits in lieu of a lump-sum payment. Weekly payments, including any state or federal unemployment compensation benefits received by the employee, would be sixty percent of the employee's "week's pay." *See* J.App. at 1304; J.App. at 1806.

The third manner of payment of LIB occurred when an eligible employee had been on layoff for one year and Westinghouse had not offered him reemployment. In that situation, the balance of the maximum sum would be paid to the employee in a lump sum, provided he was not laid off within one year of the time he would have become eligible for early retirement under the pension plan. In the latter instance, the employee would receive weekly payments until age sixty, when he would receive his early retirement pension. Payments made under the third option did not affect recall rights or service credit. J.App. at 1304; J.App. at 1806.

C. *Pre-1985 separation benefits for management personnel*

Separation benefits for management personnel paralleled the structure of LIB. These benefits are provided for in the Westinghouse "Management Separation Allowance Plan" ("MSA"), which became effective February, 1975. *See* J.App. at 1850-72. The purpose of MSA, like

LIB, was to provide financial assistance to laid-off employees during the period immediately following layoff. The MSA plan provided monetary benefits calculated on the basis of the years of credited service, the basic monthly salary at time of separation, and the reason for separation of the employee. Management employees who at the time of separation (or upon attaining age sixty) were eligible for either early or selected retirement were not eligible for MSA benefits. J.App. at 1858, 1862.

MSA benefits could be received on a monthly basis, or in a lump-sum payment. Lump-sum payments, however, had to be specifically requested by the employee, and would be made in the discretion of management. J.App. at 1864. If the employee was granted lump-sum payment, then life insurance, hospitalization, surgical, maternity, and major medical protection terminated on the last day worked.[10]

D. *The 1982 pension plan*

In July, 1982, Westinghouse revised its pension plan. The revised plan retained four categories of retirement: "normal," "deferred," "early," and "selected." Normal retirement, as under the 1979 plan, is at age sixty-five. An employee could defer retirement for any length of time until age seventy. *See* §§ 2.A. & 2.B., 1982 pension plan (J.App. at 1519).

Early retirement remained possible under any of the four subcategories that existed under the 1979 pension plan. Depending on the employee's years of service, he could retire at specified ages between fifty and sixty. A condition of early retirement under each subcategory was that the employee not have elected to receive benefits

[10] If the employee chose to receive monthly payments, these other benefits would continue for the duration of the monthly payments, or for a period of twelve months, whichever was shorter.

under the Westinghouse separation benefits plan.[11] *See* § 2.C., 1982 pension plan (J.App. at 1549-50).

Selected retirement remained possible for an employee between fifty and sixty-five years of age, depending on years of service to the company. However, the employee must not have elected benefits under the company's separation benefits plan. *See id.* at § 2.D. (J.App. at 1550).

E. *ES&P plan—the 1982 separation benefits plan for non-management employees*

In 1982, Westinghouse also revised its separation benefits plan for non-management employees and renamed it the "Employee Security and Protection Plan" ("ES&P"). *See* J.App. at 1813. With some minor changes, the plan's structure is essentially the same as the 1979 LIB plan. An employee with at least two years of service who is laid off as the result of a location closedown is eligible to receive a lump-sum payment determined by his salary and length of service. *See* 1982 ES&P plan at 2 (J.App. at 1815). If the employee is laid off due to job movement or product-line relocation, he may receive a lump-sum payment if he has at least fifteen years of service. No matter what the reason for the layoff, the employee may choose to receive weekly payments instead of a lump-sum payment. *See id.* at 2, 4-6 (J.App. at 1815, 1816-17).

Unlike the 1979 LIB plan, the ES&P plan does not preclude retirement-eligible employees from receiving separation benefits; it gives them an option. If a retirement-eligible employee is laid off because of location closedown, job movement or product-line relocation, he may elect either early retirement, or lump-sum payment of separation benefits. Employees who elect to retire are eligible to receive several pension and insurance benefits not

[11] The LIB plan was revised in July, 1982 and was renamed the "Employee Security and Protection Plan" ("ES&P").

available to those who select ES&P benefits: a pension payable for life; a supplemental monthly payment for each year of credited service until eligible for Social Security payments; an opportunity to provide continued benefits to a spouse or other person in the event of death; continuation of life insurance; continuation of medical coverage until eligible for Medicare; and continuation of dependent insurance. *See id.* at 3 (J.App. at 1815-16).

F. *Post-1985 MSA*

For purposes of this appeal, the only relevant change in the MSA plan occurred in September, 1985: a retirement-eligible management employee who is laid off may now choose either MSA or pension benefits. *See* J. App. at 742-43, 751 (T. Sept. 6 at 121-22, 140). Prior to that date, laid-off management employees were ineligible for MSA benefits if they were eligible for either early or selected retirement benefits. *See supra*, description of MSA plan, effective February, 1975.

III. *Discussion*

At the outset, we must determine whether the district court abused its discretion under Fed. R. Civ. P. 15 by permitting the EEOC to twice amend its original complaint. *See Lewis v. Curtis*, 671 F.2d 779, 783 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982); *Heyl & Patterson Int'l. Inc. v. F.D. Rich Housing, Inc.*, 663 F.2d 419, 425 (3d Cir.), *cert. denied*, 455 U.S. 1018 (1982) (grant of leave to amend will be reversed only for abuse of discretion). Those amendments expanded the action to include employment practices at Westinghouse's facilities nationwide, and to increase the list of aggrieved employees on whose behalf relief was sought. Westinghouse contends that it did not have fair notice of the additional claims or the expansion of the action. Furthermore, Westinghouse argues that it was substantially prejudiced

because the amendments rendered its initial discovery efforts inadequate, disrupted its litigation strategy, and caused a loss of opportunity to investigate and mitigate its liabilities.

We hold that the district court properly allowed the amendments. Claims asserted in amended pleadings relate back to the date of the original pleading if they "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." Fed. R. Civ. P. 15(c). The additional claims presented in the first amended complaint, like those in the original complaint, concern Westinghouse's denial of severance pay to retirement-eligible persons. The second amended complaint raised no additional substantive claims; it merely expanded the action to include employment practices in Westinghouse's facilities nationwide. The factual basis for the amended claims was identical.

Because the employment practices complained of in the original and first amended complaints were in effect at all of Westinghouse's facilities nationwide, Westinghouse was not deprived of fair notice. *See Coventry v. United States Steel Corp.*, 856 F.2d 514, 519 (3d Cir. 1988). *See also* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1501 at 526-27 (1971 & Supp. 1987) (When the original complaint notifies defendant of conduct upon which plaintiff bases his claim, it is "reasonable to assume that defendant has knowledge of any claim plaintiff might assert . . . arising out of the event in dispute."). Furthermore, increasing the list of aggrieved employees did not prejudice Westinghouse because it had notice that any employee adversely affected by its severance pay policies was a potential plaintiff. *See* Wright & Miller, § 1501 at 524.

Under these circumstances, the diminution of Westinghouse's initial discovery efforts does not constitute undue prejudice that would preclude amendment. *Cf. Cornell*

& Co. v. Occupational Safety & Health Review Comm'n, 573 F.2d 820, 825 (3d Cir. 1978) (amendment of complaint to allege safety-belt violation when original complaint alleged improper flooring on construction structure changed legal and factual matters in dispute, resulting in undue prejudice to non-moving party). Similarly, the fact that Westinghouse may have had to alter its litigation strategy as a result of the amendments is not dispositive. *See* 6 Wright & Miller § 1497, at 499-592.

Standard of Review

Our review of the district court's choice, interpretation or application of legal precepts is plenary. *In re McKeesport Steel Castings Co.*, 799 F.2d 91, 93 (3d Cir. 1986) (quoting *Universal Minerals v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981); *Killeen v. Travelers Ins. Co.*, 721 F.2d 87, 89 (3d Cir. 1983). We apply this standard to whether Westinghouse's post-employment benefits plans violate the ADEA, and if so, whether under 29 U.S.C. § 623(f)(2) they are exempt from coverage. We review under the clearly erroneous standard factual findings that underlie the district court's conclusions. Fed. R. Civ. P. 52(a); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982). Similarly, we apply the clearly erroneous standard to the facts relied upon by the district court in finding willfulness.

A. *Westinghouse's 1979 post-employment policies*

Westinghouse maintains that its 1979 post-employment policies did not violate the ADEA because they did not treat employees in the protected age group [12] less favorably than non-protected employees. Indeed, Westinghouse

[12] The ADEA protects individuals between forty and seventy years of age. *See* 29 U.S.C. § 631(a). For clarity, we refer to those individuals as "older" employees. Employees not covered by the ADEA are referred to as "younger" employees.

contends that it treated older employees more favorably than younger employees because the value of early retirement benefits (eligibility for which precluded receipt of LIB or MSA benefits) was greater than or at least equal to the value of LIB or MSA benefits plus a deferred pension.[13] In addition, Westinghouse argues that even if less-favorable treatment occurred, it was not based on age. It contends that pension eligibility, on which the denial of LIB and MSA to older employees was based, is a reasonable factor other than age and therefore its policies did not violate the ADEA. Further, Westinghouse argues that the pension, LIB and MSA plans formed a comprehensive and integrated benefits program under which no employee receives more than one type of post-employment benefit, and therefore were lawful means of ensuring that the greatest possible number of employees received at least some type of post-employment benefit.

We hold that the district court's finding that Westinghouse's denial of severance pay to employees who retire was based on age, is not clearly erroneous. Under Westinghouse's 1979 plans, older employees were treated less favorably than younger employees. Even if we accept Westinghouse's contention that the value of early retirement benefits is actuarially greater than or equal to the value of LIB or MSA plus a deferred pension, our conclusion is the same. The 1979 pension and severance pay plans denied severance pay to laid-off employees who were eligible for early or selected retirement.[14] Those

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[13] Westinghouse bases its argument that the value of pension benefits is greater than or equal to the value of LIB or MSA plus a deferred pension on the trial testimony of, and oral report by, Westinghouse's actuarial specialist. *See* J.App. at 999-1012; J.App. at 2088-92.

[14] Under the 1979 pension plans, employees who received lump-sum LIB or MSA payments were precluded from early or selected retirement. Apparently, those who received weekly LIB or monthly

employees, however, had vested rights to their retirement benefits independent of Westinghouse's policy on severance pay. It is therefore inappropriate to characterize retirement benefits as a more valuable substitute for severance pay. Any right to severance pay was in addition to, not a part of, the preexisting vested right to retirement benefits. Further, younger employees not in the protected age group, having the same length of service and being laid off for the same reason as older employees, were able to receive both severance pay and retirement benefits (when they reached the required age).[15] Therefore, older employees were treated less favorably than younger employees despite the fact that the actuarial value of early retirement benefits may be equal to or greater than the actuarial value of LIB or MSA.[16] *See*

MSA were not. This distinction is irrelevant, though, because the LIB and MSA plans did not allow retirement eligibles to receive either weekly or lump-sum severance pay.

[15] Under Westinghouse's plans, some older employees could have received both deferred retirement benefits and severance pay—for example, an employee who was laid off between the ages of forty and fifty, or one over fifty who did not have the requisite years of service. That fact is irrelevant. The ADEA protects individual rather than group rights; it is unlawful for an employer to "discriminate against any *individual* . . . because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). *See also Connecticut v. Teal*, 457 U.S. 440, 453-55 (1982) (recognizing that under a similar provision in Title VII, "an employer . . . [cannot] discriminate against some employees . . . merely because he favorably treats other members of the employees' group." *Id.* at 455). Therefore a violation can occur despite the fact that some members of the group were treated as favorably as non-protected employees.

[16] Even if it were somehow relevant whether the value of early retirement benefits exceeds the value of LIB or MSA plus a deferred pension, Westinghouse's expert's conclusions are not probative in this case. Those conclusions were based on an examination of the value of early retirement benefits to employees as a class and not on an individual basis. J.App. at 1001; J.App. at 2089.

As discussed *supra* note 15, however, the ADEA protects individual rights. Westinghouse's expert stated that actuarial mathematics is

EEOC v. Borden's, Inc., 724 F.2d 1390, 1393-94 (9th Cir. 1984).

Our inquiry does not end here, however. To establish a violation of the ADEA, the EEOC must demonstrate not only that older employees were treated less favorably than younger employees, but also that the less favorable treatment was based on age. 29 U.S.C. § 623(a)(1); *see also Smithers v. Bailar*, 629 F.2d 892, 897-98 (3d Cir. 1980) (plaintiff must show that age made a difference in the complained of decision). It is a defense to a charge of age discrimination under the ADEA that the differentiation complained of is based on reasonable factors other than age. *See* 29 U.S.C. § 623(f)(1).

Westinghouse contends that its denial of LIB or MSA benefits to employees eligible for early or selected retirement was not based on age, but on retirement eligibility. It argues that eligibility for retirement (and ineligibility for LIB or MSA) under its plans depended upon several factors, only one of which was age. Appellant's brief at 26. Those other factors are seniority, the date of involuntary termination and the reason for the termination. However, an example demonstrates that age was the determinative factor.[17] Consider two employees, each

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based on the law of averages and does not predict effects upon one individual. He therefore conceded that in some circumstances an individual who receives LIB and a subsequently vested pension might actually receive more valuable benefits than a retired employee who did not receive LIB benefits. J.App. at 1001. Thus, Westinghouse's contention that the value of early retirement benefits is greater than the value of LIB or MSA plus a deferred pension does not preclude an ADEA violation; individual employees within the protected age group may receive a less valuable benefit than severance pay plus a deferred pension.

[17] Although under Westinghouse's plans age was the determinative factor, we recognize that under the ADEA it is not necessary that age be *the* determinative factor. It is sufficient that age is *a* determinative factor in the complained of decision. *See Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259-60 (3d Cir. 1987);

having ten years of service with the company, both terminated on the same date, and for the same reason (*e.g.* location closedown). One employee is age fifty-five at the time of layoff, and the other is thirty-nine. The fifty-five-year-old employee would be eligible for early retirement under the third subcategory of early retirement and therefore would be ineligible for LIB or MSA benefits. *See* 1979 pension plan, § 2.C.3. The thirty-nine-year-old employee, however, would be eligible for LIB or MSA even though his years of service, termination date, and reason for termination are exactly the same as those of the fifty-five-year-old employee. Age, then, is clearly the basis for the denial of severance pay to the older employee. Under Westinghouse's 1979 plans, therefore, retirement eligibility was not a "reasonable factor other than age" because it is inexorably linked with age.

This conclusion corresponds with our decision in *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984) ("*Westinghouse I*"), in which we rejected Westinghouse's contention that the 1976 version of its pension and LIB plans, which denied severance pay to laid-off employees who were eligible for early retirement, was based on reasonable factors other than age. We found that eligibility for early retirement is so closely related to age that recognizing it as a justification for the denial of LIB to employees within the protected age group would defeat the purposes of the ADEA. *See id.* at 222-23. *See also EEOC v. City of Altoona*, 723 F.2d 4, 6 (3d Cir.), *cert. denied*, 467 U.S. 1204 (1983); *Borden's*, 724 F.2d at 1394.

Next, Westinghouse argues that severance pay was not denied on the basis of age, but on receipt of an alternate form of post-employment income. According to

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Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); *Smithers*, 629 F.2d at 896-98. *See also Borden's*, 724 F.2d at 1393.

the company, its LIB and MSA plans are part of an integrated benefits program designed to provide a single, immediate post-employment benefit to the greatest possible number of employees.

The district court concluded that Westinghouse's 1979 LIB and MSA plans were not part of an integrated program designed to effectuate a no-double-dipping policy. 623 [sic] F. Supp. at 366-67. The district court, citing specific examples from Westinghouse's plans, rejected Westinghouse's no-double-dipping rationale as inconsistent with the content of the pension and severance pay plans. Under those plans, severance pay and pension benefits have distinctly different purposes. Severance pay was a short-term fringe benefit to provide financial assistance during the adjustment period immediately following layoff; pension benefits were long-term retirement benefits. The district court concluded that pension benefits are not a substitute for severance pay. We agree.

The fact that Westinghouse's pension plan was referenced in the LIB and MSA plans (eligibility for the latter dependent upon ineligibility for early or selected retirement under the former) is insufficent to characterize them as integrated:

> [T]he mere fact that the benefits available to employees under the Pension Plan were to be considered when determining eligibility for LIB . . . does not merge the two plans into a 'coordinated benefit plan.' On the contrary, this interaction shows that the LIB Plan is not an integral part of the Pension Plan.

Westinghouse I, 725 F.2d at 225 (citation omitted). The LIB and MSA plans, under which eligibility for benefits was based on an employee's length of service and the occurrence of a layoff, are more analogous to a fringe benefit than part of an integrated employee benefit plan. *See id.* at 224-25; *see also Borden's*, 724 F.2d at 1396-97 (severance pay policy similar to Westinghouse's

LIB and MSA plans is a fringe benefit, not an integral part of retirement and pension package). LIB and MSA were fringe benefits provided transitionally to ease the shock of layoff. Vested pension benefits, as discussed *supra*, could not be a substitute for LIB and MSA. Therefore, the district court did not err by concluding that Westinghouse's 1979 LIB and MSA plans were not part of an integrated program designed to effectuate a no-double-dipping policy.

B. *Westinghouse's 1982 policies*

As described, *supra*, Westinghouse revised its LIB plan in 1982 (ES&P plan), and its MSA plan in 1985, to provide retirement-eligible employees who are laid off the option of selecting either early retirement benefits or severance pay. Westinghouse contends that these option plans do not violate the ADEA for the same reasons that the 1979 LIB and MSA plans did not: older employees with more service time who retire receive greater income benefits than their younger counterparts who are laid off and receive ES&P or MSA benefits. In our discussion of the 1979 plans, we have already rejected the argument that greater actuarial value cured the age discrimination inherent in the plans.

Westinghouse also argues that even if the 1979 plans violate the ADEA, the option plans, embodied in the 1982 ES&P plan and 1982 Pension plan, are valid because they provide an "additional benefit" to retirement-eligible employees: they can choose the post-employment benefit they most prefer—severance pay or early retirement benefits. The district court concluded that because choosing severance pay under the 1982 plan meant relinquishing valuable pension and insurance benefits, retirement-eligible employees have no real choice but to retire and forego severance pay. The district court concluded that affected employees would be obliged to give up the pension and insurance benefits that accompany

early retirement. 632 F. Supp. at 366 n.12. Because the court concluded that there was no real option, it saw no difference between the 1979 and 1982 plans, and therefore it considered them as one plan.

Westinghouse contends that the 1982 plans give employees a practical choice: if they value severance pay more highly than early retirement benefits, they can choose the former. Westinghouse argues that despite the greater economic value of retirement benefits compared to severance pay, other factors might make severance pay more attractive to a retirement-eligible employee.

The "additional benefit" provided by the option plans, however, does not eradicate those aspects of Westinghouse's 1979 plans that violate the ADEA. Assuming *arguendo* that retirement-eligible employees do have a real choice, whatever choice those employees make, they are treated less favorably than their younger counterparts on the basis of age. A younger laid-off employee who is ineligible for early retirement and receives severance pay does not forfeit already vested retirement benefits. On the other hand, an older employee who is eligible for early retirement forfeits already vested benefits by choosing severance pay. As discussed with regard to the 1979 plan, once an employee reaches the requisite age and years of service for early retirement eligibility, the benefits that accrue to early retirement become vested. By choosing severance pay, pursuant to the 1982 ES&P plan, that older employee automatically forgoes the benefits accompanying early retirement. ES&P plan, § 2(c), J. App. at 1274. The deprivation occurs at the time the older employee chooses severance pay.

The fact that an older employee may receive early retirement benefits at a later date, if recalled when still eligible for early retirement, does not cure the harm inflicted during the period that the older employee was deprived of vested benefits—benefits to which he was

otherwise entitled.[18] Furthermore, there is no guarantee that the employee will be recalled, and therefore he may be forever deprived of his vested early retirement benefits. In that scenario, the older employee has forfeited valuable pension and insurance benefits that accompany early retirement: a supplemental monthly payment for each year of credited service until eligible for Social Security payments; an opportunity to provide continued benefits to a spouse or other person in the event of death; continuation of life insurance; continuation of medical coverage until eligible for Medicare; and continuation of dependent insurance. J. App. at 1815-16. He would be eligible to receive only a "Vested Pension" at age sixty-five (normal retirement age), 1982 Pension Plan, § 2.C.1, J. App. at 1549, which, unlike early retirement, is not accompanied by continued medical, life and dependent insurance, or supplemental pension benefits. 1982 Pension Plan, §§ 12, 19 & 10, J. App. at 1559, 1563, 1557). Similarly, an employee eligible for selected retirement who chooses severance pay over selected retirement benefits forfeits his selected retirement benefits, and qualifies only for a "Vested Pension." 1982 Pension Plan, § 2.D.1, J. App. at 1550.

As with the 1979 LIB and MSA plans, the less favorable treatment afforded older employees by the 1982 ES&P and MSA plans is based on age. Therefore, the

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[18] It is not clear that upon recall the older employee, like the younger employee, retains the option to elect early retirement. Westinghouse contends that if both retirement-eligible employees and nonretirement-eligible employees were recalled, they could both receive early retirement benefits, with the attendant supplements and insurance benefits, if eligible at a later time. The 1982 Pension Plan, however, provides that "An employee who is laid off and would otherwise qualify for Early Retirement . . . but who elected to receive benefits under the [ES&P plan] . . . . shall not qualify for the Early Retirement Pension . . . but shall instead qualify only for a Vested Pension. . . ." 1982 Pension Plan § 2.C.1, J. App. at 1549. Of course, if the older employee loses his early retirement benefits even after recall, this compounds the discriminatory treatment.

district court's finding of age-based discrimination was not clearly erroneous. Retirement eligibility is so closely linked with age that to hold otherwise would be to eviscerate the protection afforded older employees by the ADEA. We therefore hold that Westinghouse's 1982 pension and severance pay plans violate 29 U.S.C. § 623(a)(1).

We note that the cases cited by Westinghouse as support for its position that the option plans do not violate the ADEA are inapposite. In *Britt v. E.I. DuPont de Nemours & Co., Inc.*, 768 F.2d 593 (4th Cir. 1985), the court held that DuPont's Voluntary Reduction of Force (VROF) program did not violate the ADEA. Unlike Westinghouse's program, the VROF program was entirely voluntary. Pension-eligible employees, instead of retiring or continuing to work, could choose severance pay, but only if they deferred certain pension benefits they otherwise would receive upon leaving DuPont. The court concluded that the plan did not violate the ADEA because unlike the severance pay policy in *Westinghouse I*, or *Borden's*, severance pay under the VROF program was not a fringe benefit, but a substitute for the right to continue working. *Id.* at 594. Taking severance pay "amounted in effect to additional wage earning necessitating the deferral of pension benefits in exactly the same way that continuing to work would necessitate deferral." *Id.* at 595. Indeed, that court distinguished both *Westinghouse I* and *Borden's*, which involved severance pay as a fringe benefit. *Id.* at 594-95. As we have stated, severance pay under the Westinghouse plans is a fringe benefit, not a substitute for pre-existing retirement rights.

In *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (7th Cir. 1984), the employee claimed that his former employer, Federal National Mortgage Association, unlawfully discriminated against him by denying him severance pay because of his retired status. The court, in conclusory terms without analysis (other than distinguishing the case from *Borden's*, which did not involve an option-type severance pay policy), rejected the claim because it was Parker's decision to retire rather than to

be laid off. *Id.* at 981. To the extent that the court held that an option policy like Westinghouse's does not violate the ADEA, we decline to follow it. Furthermore, the court found that Parker was unable to show that he could prove age-based discrimination if the case went to trial. *Id.* It appeared that the decision to terminate Parker was based on legitimate business factors (reasonable factors other than age) such as a contraction in the mortgage industry, and the employer's implementation of a centralization plan.

C. *The § 4(f)(2) defense (29 U.S.C. § 623(f)(2))*

Westinghouse contends that denying severance pay, or providing an option, to retirement-eligible employees who are laid off was part of a bona fide employee benefit plan and therefore, even if otherwise in violation of the ADEA, its plans are exempt from the Act's coverage under § 4(f)(2), 29 U.S.C. § 623(f)(2). Westinghouse also argues that the district court's reliance on our decision in *Westinghouse I* in rejecting the § 4(f)(2) defense was erroneous because we decided that case based on a limited summary judgment record that did not contain the information necessary to demonstrate that Westinghouse's severance pay plans were integrated with its pension plans. That information, according to Westinghouse, was: (1) that the pension and severance pay plans were negotiated contemporaneously for twenty-five years; (2) that pension-eligibility requirements were continually liberalized to allow employees who were previously eligible to receive only LIB, to receive the more valuable pension and insurance benefits; (3) that LIB benefits were increased contemporaneously with increases in value of pension and insurance benefits; and (4) that its plans were designed to effectuate a no double-dipping policy.[19]

[19] Contrary to Westinghouse's contention, the record in *Westinghouse I* was sufficiently complete to allow a determination whether the version of Westinghouse's LIB plan complained of was an

We hold that Westinghouse's LIB, MSA (both pre- and post-1985) and ES&P plans are not exempt under 29 U.S.C. § 623(f)(2). A plan can be exempt under § 4(f)(2) either as an employee benefit plan that itself satisfies § 4(f)(2), or as an integral component of an employee benefit plan that satisfies § 4(f)(2). *See Alford v. City of Lubbock*, 664 F.2d 1263, 1271-72 (5th Cir.), *cert. denied*, 465 U.S. 975 (1982). We have already rejected Westinghouse's argument, both in this opinion and in *Westinghouse I*, that its severance pay policies are part of an integrated benefits scheme designed to provide post-employment benefits to the greatest possible number of employees. Under the Westinghouse plans, severance pay is a fringe benefit for which vested early or selected retirement benefits cannot be a substitute.

We do not find dispositive the fact that the severance pay and pension plans have been negotiated contemporaneously, or that benefits under both were increased contemporaneously. The nature of the plan, rather than the manner in which it was negotiated or formulated, is the determinative factor. As we have stated, severance pay and pension benefits have different purposes under the Westinghouse plans. Although the two types of plans were negotiated together, the substance of the plans demonstrates that they are not integrated—*i.e.* the severance pay plans are not integral components of a comprehensive employee benefits scheme. For the same reason, liberalization of the pension-eligibility requirements to provide the option of pension benefits to employees who were previously able to receive only severance pay does

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integral part of its pension plan. As is apparent from the opinion, the appendix contained the 1966 and 1976 pension plans, and the LIB plan, the structure of which was not materially different from the LIB and MSA plans complained of here. The district court's opinion also contains an extensive description of those plans. 577 F. Supp. 1037-45. Furthermore, as discussed *infra*, even with the additional information in the record after trial, we reach the same conclusion.

not demonstrate integration. Pension benefits are not a substitute for severance pay. Furthermore, we have already found that the severance pay is a fringe benefit and not part of a no-double-dipping policy. These additional factors cited by Westinghouse as being unavailable to this court when it decided *Westinghouse I*, then, do not alter our conclusion that the pension and severance pay plans are not integrated.

In order to qualify as exempt under § 4(f)(2), a plan must involve age-related cost factors: *i.e.* the cost of providing benefits pursuant to the plan must increase with age. *See EEOC v. City of Mount Lebanon*, 842 F.2d 1480, 1491 n.9 (3d Cir. 1988) (citing *Westinghouse I*, 725 F.2d at 224); *see also Borden's*, 724 F.2d at 1396. Westinghouse's severance pay plans do not meet this requirement. The amount of severance pay an employee receives under the Westinghouse plans is based on the employee's length of service with the company, the employee's salary at the time of the layoff, and the reason for the layoff.[20] These factors are not directly related to age, and the costs of supplying severance pay to employees therefore does not increase with age. *Westinghouse I*, 725 F.2d at 224-25 (no age-related cost factors in LIB plan providing severance pay benefits based on length of service and occurrence of a layoff). Consider, for example, two employees who began working at Westinghouse on the same date. One employee was age sixteen at that time, and the other was age thirty-seven. After five years of employment with the company, both are laid off because of location closedown. At the time of the layoff, their salaries are identical. Both employees would receive the same amount of severance pay despite the fact that one employee is age twenty-one and the other is age forty-two. If the conditions allowing lump-sum payment are

[20] *See* 1979 LIB plan, Art. IV, §§ 1, 2 (J.App. at 1302-03); 1975 MSA plan, Part III, § A (J.App. at 1858); 1982 ES&P plan at 2-7 (J.App. at 1815-17).

met, and the employees choose that form of payment, under the ES&P plan, each would receive severance pay equal to seven and one-half weeks salary. *See* 1982 ES&P plan at 2-4 (J.App. at 1815, 1816). Under the LIB plan, the result would be similar. Both employees would receive identical lump sum severance pay equal to five week's salary. *See* 1979 LIB plan at 2-3 (J.App. at 1805). If, on the other hand, the conditions for lump-sum severance pay were not met, or the employees chose not to elect lump-sum payment, under the ES&P plan both employees would receive a weekly benefit equal to sixty percent [21] of their weekly salary until the total maximum sum (seven and one-half weeks salary) has been paid, or until the end of twelve months from the date of layoff. *See* 1982 ES&P plan at 6 (J.App. at 1817). Under the LIB plan, the result is the same, except that the total maximum sum is five weeks salary. *See* 1979 LIB plan at 4 (J.App. at 1806).

Therefore, under Westinghouse's plans, the older employee receives no greater payments than a similarly situated younger employee. In addition, Westinghouse neither provides actuarial proof nor even alleges that it costs more to provide older employees with the same severance benefits as younger employees. *See Mount Lebanon*, 842 F.2d at 1493-94. The cost of supplying the benefits does not increase with age.

Indeed, other courts have recognized that a plan based on the length of service and salary is not necessarily based on age. *See Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir.), *cert. denied*, 108 S.Ct. 2038 (1988); *Betts v. Hamilton County Bd. of Mental Retar-*

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[21] If the employee received unemployment compensation, the company would supplement those payments until the total was sixty percent of the employee's weekly salary. After unemployment compensation expired, the company would pay the full sixty percent until the employee's right to severance pay expired. *See* 1979 LIB plan at 4; 1982 ES&P plan at 6 (J.App. at 1817).

dation and Developmental Disabilities, 848 F.2d 692, 694 (6th Cir. 1988) (quoting *Karlen*).

In sum, we conclude that Westinghouse's severance pay and pension plans are not exempt under 29 U.S.C. § 623 (f)(2).

D. *Willfulness*

Westinghouse contends that the district court erred by finding that the company willfully violated the ADEA, by applying a three-year statute of limitations and by awarding double damages. There had been no formal legal challenge to Westinghouse's severance pay plans at the time it negotiated the 1979 plans. Westinghouse argues that despite its belief that the 1979 pension and severance pay plan did not violate the ADEA, it changed those plans in 1982 to provide an option of either severance pay or retirement benefits to retirement-eligible employees. Westinghouse maintains that the change was in response to a statement by EEOC counsel (in other litigation) that an option would eradicate the aspects of the 1979 plans that allegedly violated the ADEA. That change, it contends, exemplifies its desire to comply with the Act, and therefore conclusively demonstrates its lack of willfulness.

The district court found that Westinghouse willfully violated the ADEA under the standard adopted in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The *Thurston* standard permits liquidated damages under 29 U.S.C. § 626(b), when "'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Id.* at 128 (citation omitted). The Supreme Court did not decide in *Thurston* whether the same standard governs willfulness for the purpose of determining the appropriate limita-

tions period under the ADEA.[22] *Id.* at 127-28. There is a three-year limitations period for willful violations, and a two-year limitations period for non-willful violations. 29 U.S.C. § 626(e)(1) (incorporating 29 U.S.C. § 255(a)). The district court applied the *Thurston* standard of willfulness to the statute of limitations inquiry as well as to the liquidated damages issue. It found that Westinghouse acted willfully and awarded double damages to all injured employees who fell within the three-year statute of limitations.

Subsequent to the district court's decision in this case, we adopted the *Thurston* standard of willfulness to the determination of the appropriate limitations period under 29 U.S.C. § 255(a). *Brock v. Richland Shoe Co.*, 799 F.2d 80, 83 (3d Cir. 1986), *aff'd sub nom. McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988). Although *Richland Shoe* involved a claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, the same standard of willfulness applies to the statute of limitations inquiry under the ADEA. *See* 29 U.S.C. § 626(e)(1). Therefore, the district court applied the correct standard of willfulness to the statute of limitations inquiry.

In concluding that Westinghouse recklessly disregarded the requirements of the ADEA, the district court essentially relied on four factors to support its finding of willfulness:

> (1) Westinghouse "turned its face from 'the handwriting on the wall' by ignoring . . . judicial invalidations of plans similar to" its own, in particular, *Borden's* and *Altoona*; (632 F. Supp. at 372)
>
> (2) Westinghouse stubbornly resisted compliance with the ADEA by:

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[22] That issue was subsequently decided in the affirmative by the Supreme Court in *McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988).

(a) failing to question or change its policies even after receiving letters of violation from the EEOC;

(b) maintaining its severance pay policies and insisting on their validity, even after commencement of litigation challenging those policies, and this court's ruling in *Westinghouse I*;

(c) taking that action despite having knowledgeable and experienced in-house counsel to ascertain the law and to advise them; and

(d) not violating the ADEA by mere mistake;

(3) Westinghouse belatedly invented a corporate policy against double-dipping to justify its unwillingness to comply with the ADEA; and

(4) the transparency of Westinghouse's good faith argument that (a) the 1979 plan was designed before the enactment of the ADEA and was in accordance with what appeared to be the law at the time, and (b) the 1982 plan was designed in reliance on statements made by EEOC counsel in the New Jersey litigation to the effect that an option plan would cure any discriminatory defects in Westinghouse's plans.

Of those factors, the strongest evidence of willfulness would be that an employer deliberately ignored judicial invalidations of plans similar to its own. Faced with court rulings that similar plans violated the ADEA, an employer's unwillingness to change its own plans is strong evidence of willful behavior. Whether judicial invalidations of other plans put Westinghouse on notice of the invalidity of its plans, depends in part on which plans were in existence at the time of those invalidations. In evaluating willfulness, however, the district

court did not separately consider the 1979 and 1982 plans. In reviewing the district court's decision, we consider those plans separately. For reasons that follow, we conclude that the decisions in *Borden's* and *Altoona* do not support a finding of willfulness with respect to either the 1979 or the 1982 plans.

The severance pay policy invalidated by the Court of Appeals for the Ninth Circuit in *Borden's* provided that employees eligible for retirement (age 55 with 10 years of service) were not entitled to severance pay. 724 F.2d at 1391-92. The court held that retirement eligibility was not a reasonable factor other than age justifying the denial of severance pay, and concluded that the plan discriminated on the basis of age. Although the court in *Borden's* invalidated a plan similar to the Westinghouse 1979 LIB and pre-1985 MSA[23] plans, by the time that case was decided, Westinghouse already had changed its LIB plan to one that allowed employees eligible for early retirement to choose either retirement benefits or severance pay. Because *Borden's* was not decided until after Westinghouse changed its LIB plan, it does not support a finding of willfulness with respect to Westinghouse's 1979 LIB plan. Furthermore, because *Borden's* did not confront an option plan like Westinghouse adopted in July, 1982, it does not support a finding that Westinghouse willfully violated the ADEA by maintaining its ES&P and option-type MSA plans.

Similarly, *Altoona* does not support a finding that Westinghouse willfully violated the ADEA with respect to either the 1979 plans, or the 1982 plans. In that case, we stated that pension eligibility is so closely linked with age that the differential treatment afforded pension-eligible employees was not a "'differentiation[] based on reasonable factors other than age.'" 723 F.2d at 6 (cit-

[23] The timing of the change in the MSA plan is discussed *infra* footnote 26.

ing 29 U.S.C. § 623(f)(1)). We held therefore that singling out pension-eligible persons for forced retirement violates the ADEA. That case, however, involved neither a flat denial of severance pay to pension-eligible employees, nor an option. It did provide notice to Westinghouse that pension eligibility is not a reasonable factor other than age, and that Westinghouse could not deny severance pay based on pension eligibility. However, by the time *Altoona* was decided, Westinghouse had already changed its LIB plan to provide an option (ES&P plan), and no longer flatly denied severance pay to pension eligibles. Therefore, *Altoona* does not support a finding that Westinghouse willfully violated the ADEA with respect to its 1979 LIB and pension plans. Also, because we did not hold in *Altoona* that an option plan violated the ADEA, it does not support a finding that Westinghouse willfully violated the ADEA by maintaining the ES&P and MSA (as revised in 1985) plans.

Westinghouse, then, did not ignore the "handwriting on the wall." At the time *Borden's* and *Altoona* were decided, Westinghouse no longer maintained severance pay plans (except the pre-1985 MSA plan) like the ones invalidated those cases. Furthermore, because those cases did not involve option plans, they did not put Westinghouse on notice that its ES&P and 1985 MSA plans violated the ADEA. Therefore, the decisions in *Borden's* and *Altoona* do not support a finding of willfulness concerning either the 1979 or 1982 pension and severance pay plans.[24]

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[24] We note that Westinghouse did not change its MSA plan to provide an option until September, 1985. Because *Borden's* invalidated a plan similar to Westinghouse's pre-1985 MSA plan, and *Altoona* concluded that pension eligibility was not a reasonable factor other than age, the fact that Westinghouse did not change the structure of the MSA plan until almost two years after *Borden's* and *Altoona* were decided may support a finding of willfulness with respect to the pre-1985 MSA plan.

The district court also found that Westinghouse stubbornly resisted compliance with the ADEA. However, the record indicates that Westinghouse did consider whether its policies violated the ADEA,[25] *see* J. App. at 891-92; 902, 905; 1973, but refused to change its policies. While stubborn non-compliance in the face of contrary judicial authority might well constitute willfulness, good-faith adherence to, and defense of, those policies when the law is unsettled does not establish a willful violation of the ADEA. The district court correctly stated that this court's decision in *Westinghouse I* was evidence at least that the pre-1982 severance pay policies violated the ADEA. However, the district court decision [26] in *Westinghouse I*, which granted summary judgment to Westinghouse, was rendered on July 29, 1982, and this court's decision in that case was published on January 20, 1984. To the extent that the district court decision in *Westinghouse I* supported Westinghouse's position that its 1979 plans did not violate the ADEA, there was no mandate to change its plans.[27] Furthermore, by the time this court rendered its decision in that case, Westinghouse had already changed its plans to provide an option. Our decision in *Westinghouse I* does not support a finding of willfulness with respect to the 1979 plans. Nor does it support a finding of willfulness with respect to the option plans because like *Borden's* and *Altoona*, it did not invalidate an option plan.

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[25] It appears that the earliest letter of violation was issued in June, 1983, after Westinghouse had changed its LIB plan to the ES&P plan, providing an option to retirement-eligible employees. Whether Westinghouse questioned its policies after issuance of those letters is relevant to willfulness on the 1982 ES&P and pension plans only. The district court did not draw that distinction.

[26] *See* 577 F. Supp. 1029 (D.N.J. 1982).

[27] Westinghouse's stated reason for changing to an option even though the district court's decision in *Westinghouse I* supported its position is discussed *infra*.

The district court also cited its rejection of the company's no-double-dipping rationale as support for its conclusion that Westinghouse willfully violated the Act. *See* 632 F. Supp. at 373. The court found that purported justification not credible and labelled it a belated attempt to avoid the ADEA, because it was inconsistent with Westinghouse's pension and severance pay plans. In light of those inconsistencies, *see supra* Part I, we cannot say that the district court's conclusion on this point was clearly erroneous.

The district court rejected Westinghouse's good-faith argument that the 1979 plans were designed before enactment of the ADEA, and that the 1982 plans were designed in reliance upon statements made by EEOC counsel in the New Jersey "Westinghouse" litigation. The court stated that this argument is "[p]erhaps the most telling evidence of the Company's willfulness. . . ." 632 F. Supp. at 373. We recognize that continued maintenance of a plan that was lawful when developed could become the basis for a finding of willfulness if there were subsequent judicial or legislative invalidations of similar plans. Absent such forewarning, however, maintenance of a plan after enactment of a policy-oriented statute such as the ADEA, which broadly governs a plan but does not address the legality of the particular type plan at issue, alone does not support a finding of willfulness. Similarly, the fact that Westinghouse changed its plans in July, 1982 (even after the district court decision in *Westinghouse I* supporting the company's position) in response to statements by EEOC counsel that an option plan would likely cure ADEA violations, by itself does not mandate a finding of willfulness. Therefore, on remand the district court should consider whether these factors support a finding of willfulness in conjunction with other factors it relied on that remain undisturbed by our resolution of this appeal.

The district court also found that when Westinghouse adopted an option plan in July, 1982, it acted not from a desire to comply with the ADEA, but merely "to prolong and ameliorate the predictable unfavorable outcome in litigation over the plans." 632 F. Supp. at 372. Changing a policy in response to litigation, however, does not necessarily support a finding that Westinghouse willfully violated the ADEA. The district court's conclusion may be appropriate, but our review of those portions of the record relied on by the district court does not establish willfulness. On remand, the district court should review the record to determine whether its conclusion was based solely on the fact that Westinghouse changed its plans in response to litigation, or whether it was also based on additional facts and credibility determinations concerning the company's intent.

Conclusion

Because we have concluded that some of the factors relied on by the district court in support of its finding of willfulness do not support such a finding, and because that court did not consider separately the 1979 plans and the 1982 plans when making its willfulness determination, we will vacate the judgment on the issue of willfulness. We will remand to the district court to reevaluate, in a manner consistent with this opinion, whether Westinghouse willfully violated the ADEA. In all other respects, we will affirm the judgment of the district court.

Costs taxed against appellant.

GARTH, *Circuit Judge, dissenting in part*:

My colleagues in the majority have remanded this case to the district court to reevaluate "whether Westinghouse willfully violated ADEA." (Maj. op. typescript at 43.) They have done so even though, after an exhaustive analysis of the district court's seven day trial record and the

district court's 30-page opinion, the majority and I have concluded:

1) the district court's findings are clearly erroneous;

2) no evidence supports the district court's findings;

3) no suggestion appears that the parties were discouraged from adducing additional evidence or lulled into not producing additional evidence;

4) the district court fully complied with Fed. R. Civ. P. 52(a);

5) the district court in every respect applied the correct legal standard; and

6) the record is voluminous and comprehensive: (so much so, that the majority seeks only to have the district court review the very same record from which its original findings were made and as to which no evidence sufficient to sustain those findings appears).

Thus, although I agree with the majority that Westinghouse violated the ADEA and I agree that on this record, and this evidence, that the violation was not willful, I cannot agree that a remand should be ordered. In a case such as this one, where an extensive trial was held, where full opportunity was afforded for evidence to be presented by both parties, where correct legal standings were employed and where requisite findings (albeit clearly erroneous) were made, our disposition must be an outright reversal on the issue of willfulness.

The majority does not explain why, in such a situation a remand should be ordered and, "two bites of the apple" given to a litigant who has failed to produce sufficient evidence to support a desired finding and therefore carry its requisite burden as to a particular issue—in this case the issue of willfulness. By remanding, the majority grants EEOC a second chance to prove that Westinghouse

has willfully violated the ADEA, when EEOC was unable to do so the first time around.

Typically, when a plaintiff brings an action and a court lawfully determines that the evidence is insufficient to sustain the plaintiff's claim, the plaintiff is barred by the principles of res judicata and/or collateral estoppel from seeking a more favorable result by entering another forum to adduce the same evidence in support of the same claim. While I do not claim that the doctrines of res judicata and collateral estoppel are applicable here, the principles of finality enshrined in those doctrines, speak to this very situation and provide the logic for our outright reversal of the district court's holding that Westinghouse violated the ADEA willfully. The majority by remanding this case to the district court, effectively negates the principles of res judicata and collateral estoppel. It does so by allowing EEOC to retry the very same claim that the majority now rejects due to an insufficiency of evidence.

I fail to understand why EEOC should be afforded still another opportunity to reargue before the district court the very same issue which it would be barred from bringing in any other forum. The only appropriate disposition of this appeal is *not to remand* for such a meaningless exercise by the district court, but *to reverse* on the issue of willfulness, even while we affirm the district court's findings on the non-willful Westinghouse violations.

I.

As I understand the jurisprudence which has developed with respect to when a remand to the district court is appropriate, the established precedents provide:

1) District courts are the fact-finders, appellate courts are not. *Pullman-Standard v. Swint*, 456 U.S. 273, (1982). Thus, if a district court fails to make requisite findings as prescribed by Fed. R. Civ. P. 52(a), such a

proceeding should be remanded for the district court to discharge that function. *Shlensky v. Dorsey*, 574 F.2d 131 (3d Cir. 1978).

2) If the district court in making its findings applied, or relied on, an incorrect legal standard, it is appropriate to remand to the district court to rectify it [sic] error by fact-finding under the correct legal standard. *U.S. v. Gypsum*, 333 U.S. 364 (1948); *Black United Fund of N.J. Inc. v. Kean*, 763 F.2d 156 (3d Cir. 1985).

3) If the district court has prevented a party from introducing admissible evidence, or has lulled a party into a false sense of security to the extent that otherwise admissible evidence was not adduced and findings based on such a truncated record were then made by the district court, a remand to frame proper findings on a proper record is appropriate. *Dunn v. United States*, 842 F.2d 1420 (3d Cir. 1988).

4) Finally, remand may be discretionary in other rare circumstances, none of which have any relevance to the present case or to the present record. *Hritz v. Woma*, 732 F.2d 1178 (3d Cir. 1984).

If, however, none of the above conditions obtain, and a district court on a complete, unchallenged, comprehensive record, has made findings which have no support in the evidence, a remand is not the correct disposition. This is particularly so, where no claim has ever been made that a party had additional evidence which it was not permitted to introduce. In such a circumstance, I know of no authority or reason for a reviewing court to remand so that a district court may seek to justify its initial findings on the same record already found deficient to support those findings.

II.

Because I agree with the majority that the district court's findings which establish that Westinghouse violated the ADEA must be affirmed, there is no occasion

for me to address that issue. However as I have indicated, the issue of "willfulness" and the manner by which we dispose of that issue, causes me to part company with the majority.

To understand why I believe there can be no logic or basis for a remand one need only examine the reasons given by the majority in light of its analysis of the district court opinion. I turn to that task.

A.

The majority opinion analyzes the four factors relied on by the district court for the district court's finding of willfulness and concludes that of the four factors, which led the district court to find willfulness on the part of Westinghouse, only one factor may be sustained. In this analysis I join the majority in its holding that the district court's findings and conclusions are flawed. Indeed, I go one step further than my colleagues in the majority, because although they hold that Westinghouse's policy against "double-dipping" may on this record be deemed to support the district court's findings of willfulness, (Maj. op. typescript at 41-2) I do not. This difference between us is not significant, however, because the "double-dipping" policy alone, as the majority and I agree, is insufficient to sustain a finding of willfulness.

Three of the factors on which the district court relied to find willfulness—factors which were rejected by the majority because the findings made by the district court were clearly erroneous—were:

1) Westinghouse had ignored judicial invalidations of plans similar to its own.

2) Westinghouse had failed to change its policies after receiving notification from EEOC and after commencement of litigation challenging its plan.

3) Westinghouse was not in good-faith in contending that its 1979 plan (designed before ADEA was enacted), comported with the law at that time, and that Westing-

house was not in "good faith" when it designed its 1982 plan relying on statements made by EEOC to the effect that an option plan (the centerpiece of the 1982 plan), would cure any defects.

We have rejected the district court's findings and conclusions with respect to each of these factors.

(i)

As to the first factor relied on by the district court, where the district court found that Westinghouse had ignored judicial authorities which had invalidated plans that were similar to its own, we have held the district court erred in so ruling.

The majority opinion correctly reasons that when Westinghouse's plans are considered separately in relation to the judicial precedents which had invalidated so-called similar plans, it cannot be argued that Westinghouse ignored authoritative precedents. The majority opinion analyzed Westinghouse's severance pay plan and Westinghouse's option plan in light of *Equal Employment Opportunity Comm'n v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) and *Equal Employment Opportunity Comm'n v. City of Altoona*, 723 F.2d 4 (3d Cir. 1983), *cert. denied* 467 U.S. 1204 (1984) (Maj. op., typescript pages 38-40) and concludes that "[b]ecause *Borden's* was not decided until *after* Westinghouse changed its LIB plan, [*Borden's*] does not support a finding of willfulness with respect to Westinghouse's 1979 LIB plan." (emphasis added) *Id.* at 38. It goes on to hold that ". . . because *Borden's* did not confront an option plan like Westinghouse adopted in July 1982, it does not support a finding that Westinghouse willfully violated the ADEA by maintaining its ES&P, an option type MSA plan." *Id.* at 39. It further holds that ". . . *Altoona* does not suppport a finding that Westinghouse willfully violated the ADEA with respect to either the 1979 plans or the 1982 plans," *id.*, because ". . . by the time *Altoona* was decided, Westinghouse had already changed its LIB plan to provide an option (ES&P),

and no longer flatly denied severance pay to pension eligibles." *Id.* Moreover, the majority opinion correctly recognizes that ". . . we did not hold in *Altoona* that an option plan violated the ADEA . . . ." *Id.* The majority opinion therefore concludes that Westinghouse did not ignore "the handwriting on the wall" and that *Borden's* and *Altoona* do not support a finding of willfulness concerning any of the Westinghouse plans. *Id.* at 40.

Having so held, and having so dispositively rejected the district court's findings and analysis, I suggest that a remand to the district court to "consider separately the 1979 plans and the 1982 plans" as the majority opinion directs (Maj. op. typescript at 43) would serve utterly no purpose. The district court has exhaustively analyzed the evidence and the law in this respect and, as the majority opinion now reveals, that analysis was flawed. We, on the other hand, have thoroughly assessed the impact of these decisions on Westinghouse's plans, and we have now determined Westinghouse cannot be faulted, at least to the extent of finding willfulness with respect to the plans which it adopted. This is particularly so, since the resolution of the issue of "willfulness," in light of the then prevailing precedents must necessarily entail a legal determination which we are as well equipped to render as the district court. Indeed, we have rendered that decision today.

(ii)

The second factor relied on by the district court, concerning Westinghouse's failure to change its policies, has also been rejected by us. As the majority opinion reasons, Westinghouse's "good-faith adherence to, and defense of" its policies, when the law is unsettled cannot establish a willful violation of the ADEA. (Maj. op. typescript at 41). As a result, Westinghouse's actions concerning either of its plans may not be construed as willful.

(iii)

Finally, we have rejected the district court's finding that Westinghouse was not in "good-faith" when it designed its 1979 plan (before ADEA was enacted), and when it redesigned its 1982 plan in reliance on the statements by EEOC counsel in the New Jersey Westinghouse litigation. We disapproved the district court's finding by holding that there was no clear "forewarning" that Westinghouse's plans were illegal, or that the change to an option plan, based on EEOC counsel's statements, can sustain a finding of willfulness. (Maj. op. typescript at 42.)

(iv)

Therefore, the only factor identified by the district court which could bear on "willfulness", and which was not held to be clearly erroneous by the majority, was the district court's determination that Westinghouse had invented a policy against "double-dipping" in order to justify its unwillingness to comply with the ADEA. Even if that determination was not in error, the majority opinion has appropriately concluded that such a policy against "double-dipping," of and by itself, cannot sustain a finding of willfulness. Thus, this court on its own independent review of the record, properly holds that the findings made by the district court are not supported by evidence in the record and that accordingly, willfulness has not been established.

B.

At this point, therefore, under the majority's analysis of the record, an analysis with which I concur, the district court was clearly erroneous in finding that Westinghouse willfully violated the ADEA. This being so, all that remains is for us to implement our decision by an appropriate disposition of this appeal. However, the majority of the court has concluded its opinion by directing a remand, stating:

> Because we have concluded that some of the factors relied on by the district court in support of its findings of willfulness do not support such a finding, and because that court did not consider separately the 1979 plans and the 1982 plans when making its willfulness determination, we will remand to the district court to reevaluate, in a manner consistent with this opinion, whether Westinghouse willfully violated the ADEA. In all other respects, we will affirm the judgment of the district court.

Maj. op. typescript at 43-4.

Both the majority opinion and this dissent have demonstrated on this record that three of the four factors relied on by the district court to establish "willfulness" are not supported by evidence of record and the fourth factor (a policy against double-dipping), without more, cannot by itself, support such a finding. Thus, no reason exists to remand for district court reconsideration. No purpose can be served by a remand to the district court to reconsider its findings when we have already determined that those findings on this record cannot support a willful violation.

Not only is there no basis in law to remand to the district court (as distinct from an outright reversal), but of equal importance, equitable considerations militate against any further delay in the implementation of the district court's judgment which concludes that Westinghouse had committed a violation of the ADEA.

As EEOC has emphasized in all litigation brought under the ADEA—time is of the essence. EEOC has called our attention to the fact that some of the former employees aggrieved by Westinghouse's violations of the ADEA have already died and, thus, will be unable to receive the direct benefit flowing from the district court's judgment. Moreover, this case from which the present appeal arises was based on charges filed as long ago as

November 10, 1983. The appeal from the district court judgment was itself argued well over a year ago. If we remand to the district court, rather than reverse with a direction to the district court to correct its judgment, this court's decision will mark the beginning of still another stage of litigation and that litigation will undoubtedly continue through months and years to come.

Thus, the most compelling considerations of equity, fairness and law dictate that the only just disposition of this appeal, is to affirm the district court's finding that Westinghouse violated the ADEA and, at the same time, reverse the district court's finding of willfulness, with a direction that the district court modify its judgment accordingly.

Anyone who has studied the district court record and the district court's very comprehensive opinion which has combed, analyzed and sifted every bit of evidence, can only conclude that if there was any evidence which could support a finding of willfulness, the district court would have unquestionably identified that evidence, referred to it in its opinion and thus called it to our attention. To suggest that the district court ignored evidence and factors which would have supported its findings, is to indulge in unwarranted speculation and is to denigrate the thoroughness with which the district court approached its task.

For the foregoing reasons, I disagree strongly with the majority's decision to remand to the district court, as I know of no purpose which can be served by such an action. I, therefore, respectfully dissent from so much of the majority's disposition as would remand to the district court for a redetermination of the issue of willfulness.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION
Appellant

(D.C. Civil Nos. 83-5457 and 84-4799)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the Court in banc, is denied.

BY THE COURT,

s/ Anthony Scirica
Circuit Judge

Dated: Jan. 5, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION
Appellant

(D.C. Civil Nos. 83-5457 and 84-4799)

ORDER
SUR PETITION FOR PANEL REHEARING

Present: HIGGINBOTHAM, SCIRICA and GARTH,
Circuit Judges

1. After consideration of the contentions raised in the petition for rehearing filed by Westinghouse Electric Corporation in the above-entitled case and the response thereto by the Equal Employment Opportunity Commission, and all judges who participated in the decision of this Court having asked for rehearing on the basis of the contentions raised in the petition for panel rehearing, the petition for rehearing is granted. Reargument is not granted in this matter. The panel is unanimously of the opinion that the facts and legal arguments are adequately presented in the briefs and record. Rules of the United

States Court of Appeals for the Third Circuit, Court Rule 12(6)(a).

2. After rehearing, the opinion in the above-entitled matter filed on November 30, 1988, is vacated, and an amended opinion is hereby filed.

3. Judge Garth would also have granted Westinghouse's petition with regard the panel's decision to remand the issue of willfulness to the district court, rather than reversing the district court's willfulness determination. In so voting, Judge Garth relies upon the analysis and reasons set forth in his separate opinion which dissented from the panel's disposition of the willfulness issue. In that opinion, Judge Garth urged that the only appropriate disposition of the willfulness issue was an outright reversal of the district court's willfulness finding.

BY THE COURT,

ANTHONY J. SCIRICA
Circuit Judge

Dated: February 2, 1989

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civ. Nos. 83-5457 & 84-4799)

Present: HIGGINBOTHAM, SCIRICA and GARTH,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by Counsel October 20, 1987, and submitted pursuant to Third Circuit Rule 12(6) on panel rehearing February 2, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 26, 1986, be and the same is hereby vacated insofar as the determination concerning the issue of willfulness and the cause is remanded to the said District Court with direction to reevaluate, in a manner consistent with the opinion of this Court, whether Westinghouse willfully violated the Age Discrimination in Employment Act. In all other respects the said judgment is affirmed. Costs taxed against the appellant.

ATTEST:

s/ [Illegible]
Clerk

February 2, 1988

Costs taxed in favor of the appellee as follows:

Brief $157.76

Certified as a true copy and issued in lieu of a formal mandate on March 7, 1989

Test:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action Nos. 83-5457, 84-4799

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION

March 26, 1986

MEMORANDUM

KATZ, J.

In the trial of this case, I saw the human wreckage of older Westinghouse employees, let go after years of service to the Company. Because these employees were eligible for their retirement benefits, they were denied the severance pay to which younger workers were entitled. Those persons eligible for early retirement were also denied severance pay, and had to draw down their reduced pension benefits to survive.

This heartless corporate policy was justified by a variety of litigation ploys. These ranged from a belatedly invented corporate "policy" of providing a single income stream to laid off employees, to a claim that the EEOC provided insufficient conciliation efforts, to a farfetched estoppel defense that Westinghouse had relied on the flawed arguments of government lawyers in earlier litigation of this issue which it lost.

I find that Westinghouse's practice of denying severance pay to its older employees eligible for pensions is blatant, willful age discrimination.[1] I therefore enjoin the practice and award double damages to the injured employees.

I also reject the EEOC's shotgun approach of attacking a variety of other Westinghouse employment practices which are protected by law as bona fide pension and seniority arrangements. Therefore, I uphold the Westinghouse practices, other than denial of severance pay, at issue in this case.

This case began on November 10, 1982, with an administrative charge filed with the EEOC by Charles Slackway. *See* Plaintiff's Exhibit 1A. Processing of Slackway's charge culminated on June 7, 1983, with a letter of violation addressed to Westinghouse. *See* Plaintiff's Exhibit 4B. The EEOC tried to conciliate the matter. These efforts proved fruitless, and a complaint was filed in this court in November 1983. The complaint alleged: "[s]ince before June 1, 1980, and continuously up until the present time, Defendant has willfully engaged in unlawful employment practices at its Lester, Pennsylvania facility . . . ." The complaint targeted defendant's "failure to provide Layoff and Income Benefits" to thirty-five named individuals and "all other terminated or laid-off employees aged 60 and older who were eligible for early retirement benefits and/or received early retirement benefits."

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[1] The Age Discrimination in Employment Act ("ADEA"), codified at 29 U.S.C.A. §§ 621-634 (West 1985), "broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). The Act makes it "unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . [or] classify his employees in any way which would . . . adversely affect his status as an employee, because of such individual's age. . . ." 29 U.S.C.A. § 623.

Continued investigation of Slackway's case led to further charges against Westinghouse. Once again, conciliation was unsuccessfully attempted. In August, 1984, the Commission filed an amended complaint that expanded the case by including defendant's Concordville, Pennsylvania facility and increasing the number of plaintiffs to 117. It named the following ADEA violations:

> 1) denying layoff income benefits (LIB) to employees laid off prior to July, 1982, who were eligible for any type of retirement;
>
> 2) after July, 1982, giving laid off employees the option of selecting either LIB or retirement, but not both;
>
> 3) forcing laid off employees to retire prior to age 70 because LIB was not available;
>
> 4) denying early retirement to laid off employees who chose LIB;
>
> 5) denying recall to work to employees who were laid off and forced to retire; and
>
> 6) giving lower retirement benefits to laid off employees who were not eligible for retirement because of age at the time of their layoff, but who later became qualified for retirement benefits.

Plaintiffs subsequently filed a second amended complaint in October, 1984. This complaint expanded the scope of the case to a nationwide complaint embracing all of defendant's employees aged 40 or older, at all of its facilities.[2]

The EEOC's charges implicate eight of defendant's employment plans and practices. The eight challenged

[2] At the time that the EEOC filed its second amended complaint, it also filed a new collateral complaint of the same nationwide allegations. The two matters were consolidated.

practices are: (1) pre-July, 1982, arrangements for pensions and layoff income benefits, (2) post-July, 1982, arrangements for pensions and layoff income benefits, (3) arrangements for management employees, (4) Advanced Retirement Plan I, (5) Advanced Retirement Plan II, (6) an "impact number" process of awarding special benefits to certain employees laid off as a result of location shutdowns, product line relocations, or job movements, (7) limitation of retirement benefits to those actually eligible at time of layoff, and (8) limitation of death prior to retirement benefits to spouses of employees actually eligible for the benefits at the time of death. Before I examine the issues surrounding these plans and practices, it is necessary to set forth their pertinent terms.

The Pre-July, 1982, Arrangements For Pensions and Layoff Income Benefits

Prior to July, 1982, Westinghouse employees were covered by a 1979 pension plan for represented employees, and a 1979 pension plan for non-represented employees. The pertinent characteristics of the plans were identical.

1. The plans encompassed four retirement categories. Thus, employees could take a "normal," "deferred," "early," or "selected" retirement. *See* Joint Ex. 2 at 7, 47-50.

2. Employees were eligible for normal retirement at age 65. Normal retirees were entitled to a nonforfeitable pension if they were employed by Westinghouse on the day before their 65th birthdays and had begun this employment at some time preceding the first day of the month following their 60th birthdays. *See* Joint Ex. 2 at 47.

3. Employees could defer retirement. Retirements could not be deferred beyond the first day of the month following attainment of age 70. *See* Joint Ex. 2 at 47.

4. There were four early retirement possibilities. These were:

a. If an employee was age 60 or older and had 10 or more years of service, then he or she could take an early retirement. *See* Joint Ex. 2 at 47.

b. If an employee was laid off at age 59, and had between 10 and 30 years of service, then the employee could retire after his or her 60th birthday, provided he or she had not been re-employed by Westinghouse. The employee was not eligible for early retirement benefits if he or she received a lump sum, related to length of service, because of the layoff or separation. In other words, the employee could not take LIB. *See* Joint Ex. 2 at 48.

c. If an employee was laid off before age 60, due to a location closedown, and was either age 55 with 10 or more years service, or age 50 with 25 or more years of service, then he or she could take an early retirement. The employee was not eligible for early retirement benefits if he or she received LIB. Employees with contractual rights at another Westinghouse location, and employees offered employment at another Westinghouse location, were not eligible for early retirement. *See* Joint Ex. 2 at 48.

d. If an employee between ages 50 and 60 with 25 or more years of service was laid off due to a job movement or product line relocation, then the employee could apply for early retirement. The employee was not eligible for early retirement if he or she received LIB. *See* Joint Ex. 2 at 48-49.

5. Selected retirement occurred in one of two situations. These were:

a. If an employee had 30 or more years of service then he or she could choose to retire after his or her 58th birthday. *See* Joint Ex. 2 at 49.

b. If an employee between ages 50 and 60 with 30 or more years of service was laid off due to a location closedown or a product line relocation, then he or she could take a selected retirement. The employee was not eligible for selected retirement if he or she received LIB. *See* Joint Ex. 2 at 49-50.

6. Layoff Income and Benefits ("LIB"), was provided to employees with at least two years of service who were laid off through no fault of their own. At minimum, these employees received LIB in an amount equal to four weeks' pay. Employees' Total Maximum Sums of LIB were equivalent to one week's pay for each full year of service. *See* Joint Ex. 13 at 2-3.

7. LIB was provided in several different forms.

a. When layoffs were projected to continue for more than six months, employees could elect to receive the total amount due in one lump sum. This election terminated the employee's relationship with the Company. Thus, the employee lost all recall rights and credits for years of service, other than any rights existing under the pension plan. *See* Joint Ex. 13 at 3.

b. If an employee wished to retain recall rights and service credits, he or she could elect LIB in the form of weekly payments. Under this arrangement, Westinghouse supplemented weekly federal and state unemployment benefits so that the combined benefits equalled 60% of the employee's weekly pay. Receipt of the weekly company contributions was contingent upon receipt of each week's federal and state unemployment benefits. *See id.* at 4. When federal and state benefits expired, weekly company benefits equal to 60% of the employee's weekly pay continued either

until the total maximum sum had been paid out, or until twelve months had passed since the date of layoff. *See id.* at 4.

If an employee was 59 years old and had ten years of service at the time of layoff, the LIB payments ceased when the employee turned sixty and became eligible for early retirement. *See id.* at 4.

If an employee was laid off for a year and had not been offered reemployment with Westinghouse, then weekly payments ceased and the employee received the balance of the total maximum sum in a lump sum. If, however, the employee was laid off within one year of eligibility for early retirement, then the employee received his or her early retirement pension at age 60. *Id.* at 4.

8. Employees were not eligible for LIB if they were eligible for early or selected retirement pension benefits. *See id.* at 2.

The Post-July, 1982, Arrangements For Pensions And Layoff Income Benefits

In July, 1982, Westinghouse implemented certain changes in its pension benefits and LIB programs. The resulting plans apply to all employees.

9. Eligibility for normal retirement continues to accrue at age 65. As before, the retiring employee is entitled to a non-forfeitable pension if he or she was employed by Westinghouse on the day before his or her 65th birthday and had begun such employment before age 60. *See* Joint Ex. 3 at 36.

10. Employees can defer retirement. Retirements may not be deferred beyond the first day of the month following attainment of age 70. *Id.*

11. There are four possibilities for early retirement.

a. If an employee has ten or more years of service, then he or she can take early retirement after

turning 60. If the employee is laid off and elects to receive LIB benefits, then he or she is only entitled to vested pension benefits rather than full early retirement benefits. *See id.* at 36-37.

b. If an employee is laid off after turning 59 but before age 60 and has between ten and thirty years of service, then he or she can retire after turning 60. The employee cannot take early retirement if he or she has returned to employment with Westinghouse before turning 60. If the employee elects to receive LIB, then the employee is not eligible for full early retirement benefits. *See id.* at 37.

c. If an employee is laid off before age 60, due to a location shutdown, then the employee can take an early retirement if he or she meets one of the following age and years of service requirements:

1. Age 55 with 10 or more years of service.
2. Age 54 with 13 or more years of service.
3. Age 53 with 16 or more years of service.
4. Age 52 with 19 or more years of service.
5. Age 51 with 22 or more years of service.
6. Age 50 with 25 or more years of service.

Employees with contractual employment rights at another Company location, and employees offered employment at another Westinghouse Location, are not eligible for early retirement. If an employee elects to receive LIB, then the employee is not eligible for early retirement. *Id.* at 37-38.

d. If an employee between ages 50 and 60, with 25 or more years of service, is laid off due to job movement or product line relocation, then the employee can apply for early retirement. If the employee elects to receive LIB, then he or she cannot receive early retirement benefits. *Id.* at 38.

12. Selected retirement can occur in two situations.

a. If an employee has 30 or more years of service, then he or she can retire between ages 58 and 65. If an employee is laid off and elects to receive LIB, then the employee is not eligible for selected retirement benefits. *Id.* at 38-39.

b. If an employee between ages 50 and 60, with 30 or more years of service, is laid off due to location closedown, job movement, or product line relocation, then he or she can apply for selected retirement. Employees with contractual employment rights at another company location, and employees offered employment at another Westinghouse location, are not eligible for early retirement. If the employee elects to receive LIB, then the employee is not eligible for selected retirement benefits. *Id.* at 39.

13. The post-July, 1982, Employee Security and Protection Plan fulfills essentially the same purposes as the pre-July, 1982, Layoff Income and Benefits Plan. Thus, it provides income protection to employees who are laid off due to a location shutdown, job movement, product line relocation, or other reasons associated with the business rather than the employee's fault. *See* Joint Ex. 14 at 1. The plan provides LIB under essentially the same terms as the pre-July, 1982, plan. *See id.* at 2, 2-6; *see also supra* paragraph 7 (describing the pre-July, 1982, LIB arrangements). The plan also encompasses Westinghouse's "impact number" process for awarding enhanced benefits for layoffs due to job movements, or product line relocations. *See* Joint Ex. 14 at 4-5; *see also infra* paragraphs 30-31 (describing impact number process).

14. If an employee is laid off after turning 59 and has 10 years of service, then he or she can elect to retire at age 60. If the employees makes this election, then he or she receives LIB until turning 60 or until the total maximum sum is paid, whichever is first. *Id.* at 7.

Westinghouse's Arrangements For Management Personnel

15. There are three components to Westinghouse's arrangements for its managerial employees. These are: a management separation allowance program ("MSA"), *see* Joint Ex. 20, a pre-retirement income plan ("PRIP"), *see id.*, and an executive pension plan, *see* Joint Ex. at 4.

16. MSA benefits are similar to LIB benefits. MSA provides a total dollar sum in an amount related to years of service and level of salary at the time of separation. This sum is payable on a monthly or lump sum basis. *See* Joint Ex. 20.

17. If an employee desires MSA in a lump sum, then he or she must specifically request that form of payment. If the employee makes this election, then he or she forfeits life insurance benefits. *Id.* at 9-10. Under the monthly payment scheme, life insurance benefits, hospital expense and surgical operation insurance, maternity benefits, and major medical protection benefits continue with MSA payments or for 12 months, whichever period is shorter. *Id.* at 9. All other insurance benefits terminate on the last day worked. *Id.* at 10.

18. If an employee is laid off but is subsequently re-employed by Westinghouse, then he or she can keep all monthly payments received up to that time; however, lump sum payments in excess of the amount that would have been received in the monthly payments must be repaid. *Id.* at 11.

19. Prior to September, 1985, MSA benefits were not available to management employees who were eligible for an early or selected retirement pension either at the time of separation or at age 60. *Id.* at 7. Such employees may now select either MSA or pension benefits; however, they may not receive both. *See* T. Sept. 6 at 119-21.

20. PRIP provides lifelong monthly supplements to early or selected retirement pension benefits. *Id.* at 19.

21. PRIP benefit levels are determined by the reason for the employee's separation, and the employee's age and length of service. *Id.*

22. A management employee aged 59 but not yet 60, with between 10 and 30 years of service, receives monthly PRIP payments equivalent to the early retirement pension and PRIP supplement which he or she will receive at age 60. *Id.* In other words, such employees are treated as if they already are age 60, except that all money received is in the form of PRIP rather than allocated between pension benefits and PRIP. In order to qualify for such treatment, the reason for separation must be other than a location shutdown. *Id.* at 20.

23. Westinghouse also has an executive pension plan for its managerial employees. *See* Joint Ex. 4.

Advanced Retirement Plans I & II

24. Westinghouse operated two advanced retirement programs during the time period in question. These plans are known respectively as ARP I and ARP II.

25. ARP I was in effect from June 1, 1982, through November 1, 1982. It provided certain benefits to employees who voluntarily chose to advance their date of retirement from locations with announced or contemplated reductions in force. *See* Joint Ex. 5 at 1. These benefits stemmed from pension plan improvements scheduled to take effect after the employees' chosen retirement dates. Thus, ARP I removed incentives to delay retirement by making improved benefits available to employees who would not have received such benefits without delaying retirement. The purpose of the program was to eliminate the need to separate less senior employees by encouraging attrition through voluntary retirement. *See id.* Thus, the number of ARP I participants was to correspond to the number of employees who would otherwise be subject to the reduction in force. Similarly, the

program was restricted to employee categories affected by the reduction in force. *Id.*

26. ARP I participants had to be eligible for retirement at some time between June 1, 1982, and November 1, 1982. Thus, they had to be age 58 with 30 or more years of service, or age 60 with 10 or more years of service, during the relevant time period. *Id.* at 2.

27. The ARP I pension plan improvements were effective on August 1, 1982. Employees who were eligible to retire before that date could elect to retire, and were furloughed until August 1. They received any supplement that was necessary to make unemployment compensation payments equivalent to pension plan benefits in effect at the time of furlough. *Id.* at 1. On August 1, these employees retired and commenced receiving their improved pension benefits. *Id.*

Employees who were eligible to retire after August 1 could elect to retire on that date or, upon becoming eligible to retire, on the first day of any subsequent month up to November 1, 1982. Upon retirement, they received pension benefits under the improved plan. *Id.* at 1-2.

28. ARP II was similar in operation and purpose to ARP I. It was in effect between March 1, 1983, and September 1, 1983. *See* Joint Ex. 7. Like ARP I, it applied to locations and employee categories with announced reductions in force. *Id.* Participants had to be eligible for retirement at some time between March 1, 1983, and September 1, 1983. Thus, they had to be age 58 or 59 with 30 or more years of service, or age 60 or older with 10 or more years of service. *See* Joint Ex. 8.

29. ARP II pension plan improvements were effective on January 1, 1984. *See* Joint Ex. 7. ARP II participants were furloughed until that date. While on furlough, they received any payments necessary to bring their unemployment compensation up to 60% of their pay. *See*

Joint Ex. 8. On January 1, their retirements became effective and they commenced receiving their improved benefits. *Id.*

The Impact Number Process

30. The so-called "impact number process" is utilized in the event of layoffs due to job movements or product line relocations. *See* Joint Ex. 14 at 4-5. Such layoffs result from "the permanent discontinuance of the manufacturing of a product at a Company Location, provided that product continues to be produced by the Company, but at a different Westinghouse Location." *See* Joint Ex. 11a at 102.

31. When a job movement or product line relocation takes place, the Company estimates the "number of employees on jobs affected" at the location experiencing the job movement or product line relocation. Joint Ex. 14 at 4. This number is also referred to as an "impact number." The Company then assumes that any employee who is laid off from the location is affected by the job movement or product line relocation. *Id.* This assumption continues until the number of employees laid off at the location matches the pre-established impact number. *Id.* The impact number is also reduced by "normal attrition." *Id.* If the impact number is not matched within five years after announcement of the job movement or product line relocation, then impact numbers cease to be available. *Id.*

32. Employees laid off from the location before the impact numbers are used up receive enhanced benefits. For employees with 15 or more years of service, these benefits take the form of a lump sum payment equal to one and one half times a week's pay for each full year of service. Employees can elect one of the regular LIB options instead of the lump sum. Employees age 50 with at least 25 years of service can elect early retirement instead of the lump sum payment. *Id.* at 4-5.

Limitation of Retirement Benefits to Employees Eligible At Time of Layoff or Death

33. Westinghouse retirement benefits are distributed according to eligibility criteria comprised of various combinations of age and years of service. The 1979 pension plan criteria are set forth in paragraphs 2-5, *supra*. The 1982 pension plan criteria are set forth in paragaphs 9-15, *supra*. In order to receive benefits, employees must have attained one of the requisite age and service combinations at the time of retirement or layoff.

34. Both the 1979 and 1982 Westinghouse Pension Plans provide benefits to the spouses of employees who died before attaining retirement age. To qualify for such benefits, the recipient spouse must have been married to the deceased employee for at least one year. Furthermore, the deceased employee must have completed 30 years of service, or have attained age 50 and completed 15 years of service, or have attained age 60 and completed 10 years of service. *See* Joint Ex. 1 at 8; Joint Ex. 3 at 3.

35. Eligible spouses receive monthly pension payments for life. In any event, payments attributable to the contributory portion of the pension plan are guaranteed for 60 months. Thus, if the spouse dies before receiving 60 payments, the balance due fom the contributory portion of the plan is paid to a designated beneficiary. *See* Joint Ex. 1 at 8; Joint Ex. 3 at 3.

DISCUSSION

Issues In The Case

The EEOC charges that each of the above-described plans violates the ADEA. I will briefly describe plaintiff's arguments, as well as Westinghouse's responses. I will then analyze the merits of the parties' contentions.

1. The EEOC contends that the interaction of eligibility criteria for retirement and pension benefits with

eligibility criteria for severance pay violates the ADEA because it results in denial of severance pay on the basis of age. Under the 1979 pension plan, employees who were laid off and were eligible for any type of retirement could not receive severance pay. Under the 1982 pension plan, laid off employees who were eligible for retirement could choose between pension benefits and severance pay, but could not receive both. Until September, 1985, management personnel who were eligible for retirement were not eligible for severance pay.

Westinghouse contends that the interaction of its severance pay plans and pension benefits plans does not violate the ADEA. On the contrary, it argues that the plans are *bona fide* employee benefit plans exempt from the ADEA. *See* 29 U.S.C.A. § 623(f)(2).

2. The EEOC contends that ARP I and ARP II effectively forced or induced older laid off employees to retire and take their pensions. The EEOC interprets the ADEA to require distribution of both LIB and pension benefits; it contends that employees would not have participated in ARP I and ARP II if they had been able to take both LIB and their pensions.

In response, Westinghouse avers that participation in ARP I and ARP II was voluntary. According to Westinghouse, employees participated in ARP I and ARP II because "the total package of early retirement benefits was more valuable to them than LIB would have been and because the ARP programs offered 'considerable [benefits] in favor of the pensioner.'" *See* Defendant's Post-Trial Brief at 63.

3. The EEOC challenges

> the terms of the Pension Plan that preclude a laid off employee who was not old enough to retire when laid off from retiring upon attaining the minimum age. For example, an employee laid off at age 58

> with 10 years of service cannot retire when he turns 60. Instead, the employee is limited to a lower Vested pension, without a pension supplement and without continuation of insurance.

Plaintiff's Post-Trial Memorandum at 59. According to the EEOC, the employee who is laid off with the requisite years of service should receive benefits when he or she attains the requisite age. For example, if an employee with 15 years of service is laid off at age 48, then benefits should commence when the employee turns 50.

The EEOC similarly challenges the limitation of death prior to retirement benefits to spouses of employees who were actually eligible for them at the time of death. According to the EEOC, benefits should be distributed upon the anniversary of the deceased's qualifying birthday. That is, if an employee dies with 15 years of service dies [sic] at age 48, then benefits should commence when the deceased would have turned 50.

Westinghouse contends that the limitation of retirement benefits and death prior to retirement benefits to employees and spouses of employees actually eligible at the time of layoff or death is permissibly justified by cost considerations.

4. Because layoffs proceed on a "last hired, first fired" basis, employees most likely to receive impact numbers and consequent enhanced benefits are those with the least seniority. The EEOC therefore contends that the impact number process discriminates against older employees because they are disproportionately unable to receive impact number benefits.

Westinghouse contends that this effect is the result of a *bona fide* seniority system exempt from the ADEA. *See* 29 U.S.C.A. § 623(f)(2).

5. Westinghouse offers three affirmative defenses to the EEOC's charges. First, it contends that the EEOC

is estopped from challenging the 1982 pension plan. Second, it argues that the EEOC did not meet its statutory obligation to conciliate any alleged violations other than those in the original complaint. Third, it argues that the EEOC's amended complaints are barred by the statute of limitations. Westinghouse therefore urges that all allegations other than those in the original complaint pertaining to the 1979 plan should be dismissed.

6. The final issues in this case involve the question of willfulness. Under the ADEA, a finding of willfulness triggers application of a three year statute of limitations. It also triggers availability of liquidated damages. If I find Westinghouse in violation of the ADEA, I must therefore determine three things. First, I must select the applicable willfulness standards for statute of limitations and liquidated damages purposes. Second, I must determine whether the three year statute of limitations applies to this case. Third, I must determine whether liquidated damages are available to the plaintiffs in this case.

I will begin with defendant's affirmative defenses. Next, I will consider the validity of defendant's LIB and pension plan arrangements. I will then consider the remaining challenged practices: ARP I and ARP II, the limitation of retirement benefits and death prior to retirement benefits to employees and spouses of employees actually eligible at the time of layoff or death, and the impact number process. Finally, I will take up the willfulness issues.

Defendant's Affirmative Defenses

I reject defendant's affirmative defenses. Thus, the EEOC is not barred from litigating any of its claims and all of the above-described issues are properly before this court.

1. Estoppel

In 1982, Westinghouse changed its programs to provide an option between LIB and pension benefits. It claims that these changes were made in reliance upon statements made by the EEOC. It therefore argues that the EEOC is estopped from challenging Westinghouse's 1982 practices.

Westinghouse's estoppel claim is based upon events in another lawsuit in the United States District Court of New Jersey.[3] In the course of that litigation, counsel for the EEOC argued that provision of an option between LIB and pension benefits would satisfy the ADEA. Specifically, counsel for the EEOC stated: "What they are entitled to be is made whole under . . . the Age Section, and to be made whole they are only entitled to that option, [between taking early retirement benefits or severance pay] whichever one they accepted." *See* D. Ex. 38(b) at 37-38. Westinghouse also relies upon arguments made by the EEOC in a reply brief filed with the Third Circuit during its appeal from the District Court's decision. The pertinent terms of the brief stated: "the Commission has always asserted that the employee age 55 and over should have had the option to choose either severance pay or early retirement payments. . . . Such an option would not have been discriminatory." *See* D. Ex. 38(a) at 8-9.

In order to establish estoppel under the ADEA, Westinghouse must show that it acted in good faith conform-

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[3] The litigation, entitled *EEOC v. Westinghouse Electric Corporation*, is reported at 577 F.Supp. 1029 (D.N.J. 1982). The case involved a challenge to Westinghouse's denial of LIB to employees, laid off from Westinghouse's Belleville, New Jersey plant, who were eligible for retirement benefits. The District Court granted Westinghouse's motion for summary judgment. The Third Circuit reversed the grant of summary judgment and remanded the case to the District Court. *See* 725 F.2d 211 (3d Cir. 1983). The United States Supreme Court denied certiorari. *See* —— U.S. ——, 105 S.Ct. 92 (1984).

ity with, and in reliance on, a written administrative regulation, order, ruling, approval, or interpretation of the EEOC. *See* 29 U.S.C.A. § 259 (West 1985) (Portal-to-Portal Act, incorporated into ADEA by 29 U.S.C.A. § 626(e)). Reliance upon an oral declaration of an agency official is not sufficient to estop the government. *See Anness v. United Steelworkers of America*, 708 F.2d 917, 921-22 (6th Cir.1983) (interpreting estoppel provisions of ADEA). This means that Westinghouse must have relied upon a formal, written agency pronouncement. *Id.*

To establish non-statutory, equitable estoppel, Westinghouse must demonstrate the existence of several elements. These are: 1) EEOC words, acts, conduct or acquiescence causing Westinghouse to believe that an option arrangement would satisfy the ADEA, 2) EEOC willfullness or negligence with regard to such acts, conduct or acquiescence, and 3) detrimental reliance by Westinghouse. *See Lovell Manufacturing v. Export-Import Bank of the United States*, 777 F.2d 894, 898 (3d Cir.1985). Westinghouse's reliance must have been reasonable. *Id.* (quoting *Heckler v. Community Health Services of Crawford County, Inc.*, —— U.S. ——, 105 S.Ct. 2218, 2224 (1984)). Finally, because Westinghouse seeks to estop the government, there must have been some affirmative misconduct on the part of the EEOC. *Id.* at 899.[4]

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[4] Westinghouse urges that this case is a private action because the EEOC seeks money due to individual citizens. Westinghouse therefore argues that it is seeking to estop a private party rather than the government. Nonetheless, I find that this case involves estoppel of the government.

"[T]o the extent that a Title VII suit by the EEOC seeks recovery of sums due individual citizens . . . it is a private and not a public action. . . ." *EEOC v. American Machine & Foundry, Inc.*, 13 Fair Empl.Prac.Cas. (BNA) 1634, 1626 (M.D.Pa. 1976). "[T]o the extent that it seeks other relief, such as an injunction against future discriminatory practices, it is a public action. . . ." This

I find that Westinghouse has not established the elements of estoppel. First, even assuming that the words or acts of counsel for the EEOC caused Westinghouse to change its LIB and pension plans, and even assuming that counsel for the EEOC acted willfully or negligently and engaged in affirmative misconduct, any reliance by Westinghouse was unreasonable.

The EEOC is not bound by erroneous statements of its trial counsel. *See Donovan v. I and J, Inc.*, 567 F.Supp. 93, 104 (D.N.M.1983). EEOC trial counsel had no actual or apparent authority to speak for the agency as a whole. *Cf. Santos v. Franklin*, 493 F.Supp. 847, 855-56 (E.D.Pa.1980) (actual and apparent authority of government actor are relevant to estoppel). Westinghouse's experienced counsel were well aware of the limits of EEOC counsel's authority. Any reliance on EEOC counsel's statements was therefore unreasonable.

Westinghouse's purported reliance is also unreasonable because of the nature and context of the statements of EEOC counsel. The statements were not official agency pronouncements directed towards charting a course of future conduct. On the contrary, they were arguments

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case obviously includes public action features. Moreover, estoppel in this case presents considerations of public importance, because Westinghouse seeks to use statements made in the course of litigation to estop subsequent litigation.

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well-settled that the Government may not be estopped on the same terms as any other litigant.

Heckler v. Community Health Services of Crawford County, Inc., —— U.S. ——, 104 S.Ct. 2218, 2224 (1984). Estoppel in this case would affect the ability of government agencies effectively to litigate issues of public importance. It might foster hesitant advocacy. It might also foster hindrance of government counsel through their predecessors' mistaken or hasty statements. Standards for estoppel of the government therefore should apply.

made in the process of advocacy. Such statements do not bind the EEOC. *See Heckler v. Community Health Services of Crawford County, Inc.*, 104 S.Ct. at 2227; 29 U.S.C.A. § 259 (requiring formal, written agency pronouncement for estoppel under the ADEA).

At bottom, I find that Westinghouse in fact did not rely upon the statements of EEOC trial counsel. Instead, the 1982 change was an independent tactical decision made for a perceived litigation advantage. Stuart Saltman, Westinghouse Chief Counsel for Human Resources, testified that he reviewed the transcript of EEOC trial counsel's statements made in the District Court of New Jersey. He then recommended that "serious consideration" be given to "attempting to . . . cut off future liability with respect to the issues that were involved in the L.I.B. . . . litigation . . . and serious consideration be give[n] [sic] to cutting down future liability by adopting the position that EEOC had taken as reflected in the statements. . . ." *See* T. Sept. 10 at 42 l. 9-15. Mr. Saltman's recommendation was based upon more than the transcript, however. He testified that it stemmed from

> continuing familiarity with the position that the EEOC had taken, which I had both heard from others and seen in the documents that had been submitted to me over the course of the history of this thing. . . . This [transcript] was a confirmation in writing, of the fact that that was the EEOC's position . . . in 1978. . . . [t]he attorney on my staff who was handling the case walked in, sat down in my office and said he had been talking to the Department of Labor about the charge . . . and said that the Department of Labor in essence takes the position that the plan is illegal because it didn't provide an option.

See T. Sept. 10 at 48-50.[5] Mr. Saltman thus perceived what he believed was the government's "informal position" as early as 1978, but the Company made no change until July, 1982. The change was set in motion no earlier than March, 1982. *See id.* at 51. The delay suggests that the Company did not rely upon the statements of EEOC trial counsel.

Even if there was reliance, it was not detrimental, because Westinghouse did not change its position for the worse. Westinghouse claims that its 1979 plan was valid; it implemented the 1982 plan as an independent business and legal judgment to reduce the risks of future liability. *See* T. Sept. 10 at 42 l. 4-24, 43 l. 1-8. If the statements had not been made, Westinghouse would have defended its 1979 plan. In short, Westinghouse's position did not change in reliance on the EEOC lawyer's argument in the New Jersey case.

Finally, there is no sign of any affirmative government misconduct supporting estoppel. *See Donovan v. I and J, Inc.*, 567 F.Supp. at 103-04. Mere provision of erroneous information is usually not sufficient to establish estoppel. *See Portmann v. United States*, 674 F.2d 1155, 1165 (7th Cir.1982); *Donovan v. I and J, Inc.*, 567 F.Supp. at 104. At minimum, estoppel appears to require an "affirmative misrepresentation." *See Santos*, 493 F.Supp. at 853. The statements at issue in this case cannot be so characterized. Trial counsel's statements were not affirmative misrepresentations because his role did not involve policymaking. He was arguing a case, not stating EEOC policy.[6]

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[5] Neither Mr. Saltman nor anyone else at Westinghouse ever attempted to ascertain whether this was in fact the EEOC's position. *See* T. Sept. 10 at 18-20. Statements that may have been made by Department of Labor lawyers cannot bind the EEOC, for the same reasons that the Commission is not bound by the statements of trial counsel. *See Donovan v. I and J, Inc.*, 567 F.Supp. 93, 104 (D.N.M. 1983).

[6] Westinghouse has renewed its efforts to establish estoppel by submitting a motion to supplement the trial record and defendant's

2. EEOC Good Faith and Conciliation

According to Westinghouse, the EEOC failed to conciliate any claims other than those regarding the pre-1982 LIB program at the Belleville, New Jersey and Lester, Pennsylvania facilities. The Company therefore urges that all other charges should be dismissed. Under the ADEA, the EEOC must "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [the ADEA] through informal methods of conciliation, conference, and persuasion." *See* 29 U.S.C.A. § 626(b). This means that the Commission must give employers an opportunity to comply voluntarily with the ADEA. *See Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir.1974). "'Formal methods'" of enforcement are to be applied "'only in the ultimate sense.'" *Id.* (quoting legislative history). In practice, fulfillment of the obligation to conciliate must be evaluated on the facts in each case. *See Marshall v. Sun Oil Company (Delaware)*, 605 F.2d 1331, 1334 (5th Cir.1979). Nonetheless, some requirements appear to be common to all cases. The employer must be told how to achieve compliance: "[p]ersuasion cannot be accomplished if the desired goal is unknown." *See Brennan*, 495 F.2d at 375. Specifically, the employer should be informed (1) of the ways compliance may be achieved, (2) that affected employees may receive "make whole" remedies, (3) that the Commission may institute legal action, and (4) that the employer may

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post-trial brief. Westinghouse seeks to submit transcripts of congressional hearings regarding the appointment of Jeffrey Zuckerman as General Counsel for the EEOC. Statements made by Mr. Zuckerman purportedly support defendant's position on the issues of estoppel, the statute of limitations, and willfulness. Defendant's motion grabs at straws. Mr. Zuckerman's testimony at a confirmation hearing presumably reflects his personal position regarding EEOC enforcement. Because of their nature and context, his statements cannot bind the EEOC. Moreover, Westinghouse obviously did not rely on these statements made long after the period at issue in this case.

respond to the Commission's allegations. *See Marshall v. Sun Oil Company (Delaware)*, 605 F.2d at 1334-35; *see also Brennan*, 495 F.2d at 375. I find that the Commission met all of these requirements.

Westinghouse was made aware that the Commission's goal was elimination of the named practices. Westinghouse also knew that "make whole" remedies were implicated because the Commission advised Westinghouse that "full restitution" in the initial Slackway case entailed full eligibility for LIB. *See* P.Ex. 4C. The letters of violation issued to Westinghouse advised the Company of the Commission's allegations, invited conciliation, and explicitly referred to the possibility of litigation. Moreover, a follow-up to the July 16, 1984, letter of violation advised Westinghouse that "while we will continue to attempt to reach a voluntary settlement of this case, the case will be referred to the Legal Unit for litigation consideration." *See* P.Ex. 4E, 4F, & 4G.

The Commission also fulfilled its duties in the actual conciliation process. The EEOC's compliance with its obligation to conciliate is measured by the effort it expends. *See, e.g., EEOC v. KECO Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir.1984) (court should only determine whether EEOC attempted conciliation; form and substance is within EEOC discretion); *EEOC v. Prudential Federal Savings & Loan Association*, 763 F.2d 1166, 1168 (10th Cir.) (enough that Commission makes a sufficient albeit limited effort to conciliate), *cert. denied*, —— U.S.——, 106 S.Ct. 312 (1985). The EEOC's efforts are sufficient if "it makes a sincere and reasonable effort to negotiate by providing the defendant an 'adequate opportunity to respond to all charges and negotiate possible settlements.'" *See id.* at 1169 (quoting *Marshall v. Hartford Fire Insurance Company*, 78 F.R.D. 97, 107 (D.Conn. 1978)).

The EEOC's conciliation attempts in this case met these criteria. In June, 1983, the Commission attempted

to conciliate the initial Slackway charge. *See* P.Ex. 4B, 4C. After meeting with the EEOC, Westinghouse rejected the Commission's conciliation proposal. *See* P.Ex. 4C. The EEOC then advised Westinghouse that it would consider litigation but would also continue to attempt a voluntary settlement. *See* P.Ex. 4D. On July 16, 1984, the EEOC issued its second letter of violation. The letter added new charges, and again offered conciliation. *See* P.Ex. 4E. Westinghouse did not respond to the conciliation offer. *See* P.Ex. 4F. On September 14, 1984, the EEOC issued its third letter of violation. This letter expanded the case to nationwide scope, and again offered conciliation. *See* P.Ex. 4G. Once again, Westinghouse did not respond to the conciliation offer. *See* T. Sept. 10 at 64 l. 1-19. Finally, I ordered a conciliation effort. Pursuant to my order, a conciliation conference took place in January, 1985. *See id.* at 67-70. Westinghouse subsequently informed the EEOC that it found the Commission's conciliation proposal "unacceptable in its present form." *See* P.Ex. 4H. Clearly, the Commission made a sustained conciliation effort.

Westinghouse alleges that the Commission's efforts were not genuine, because the EEOC acted in bad faith. Westinghouse supports this allegation with several arguments. First, Westinghouse argues that the EEOC could not, and did not, approach conciliation in good faith once it began litigation on the Slackway charge. Second, Westinghouse contends that the Commission did not adequately investigate the charges leveled in its letters of violation. Third, Westinghouse argues that the EEOC demonstrated bad faith by giving Westinghouse too short a time to respond to the letters of violation.[7] Finally, Westinghouse

[7] The July 16, 1984, letter of violation gave Westinghouse until July 23, 1984, to accept in writing the Commission's conciliation offer. The letter instructed that failure to respond by that date would lead the Commission to presume that Westinghouse rejected the conciliation offer. *See* P.Ex. 4E. Similarly, the September 14,

contends that the EEOC came to the court-ordered conciliation with five new inadequately investigated allegations, ignored court orders to suspend discovery during the conciliation period, and revealed its insincerity by designating its trial attorney as its conciliator.

I find that the EEOC acted in good faith. It is of no consequence that the EEOC added, and attempted to conciliate, charges after filing a judicial complaint. Once a letter of violation has been sent, the employer is well aware that litigation may ensue. Thus, "[a]ctions initiated by the Secretary before the termination of conciliation would not place undue pressure on the employer to settle the charges. . . ." *See Vance v. Whirlpool Corporation*, 707 F.2d 483, 488 (4th Cir.), *modified* on other grounds, 716 F.2d 1010 (4th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1600, 2678 [sic] (1984). While it is true that "a Commission lawsuit brought before any attempt at conciliation is premature," *see EEOC v. Hickey Mitchell Co.*, 507 F.2d 944, 948 (8th Cir.1974) (Title VII case), a suit is not premature once conciliation has commenced. What is crucial is provision of an opportunity to conciliate. *See id.*

I find that Westinghouse was provided with conciliation oppportunities. Westinghouse was informed adequately of the Commission's allegations. The letters of violation named specific Westinghouse policies and practices. While the EEOC did not give Westinghouse a great deal of time to consider its charges and conciliation offers, Westinghouse only had to make an initial decision whether to respond in good faith. A full-blown answer was not required. Thus, the Company was given an adequate response time. Nonetheless, it did not respond.

1984, letter of violation requested a written response by September 24, 1984, and advised that failure to respond would be interpreted as a rejection of conciliation. *See* P.Ex. 4G. Westinghouse incorrectly interprets these short response times as a sign that the EEOC was not anticipating or hoping for conciliation.

The fact that the Commission did not limit itself to the charges enumerated at the outset does not mean that it acted in bad faith. The EEOC is not limited to its initial allegations; rather "a complaint filed by the EEOC is limited to the investigation *reasonably expected* to grow out of the initial charge of discrimination." *EEOC v. KECO Industries, Inc.*, 748 F.2d 1097, 1101 (6th Cir. 1984). In *KECO Industries, Inc.*, an individual sex discrimination charge broadened into an EEOC claim on behalf of all of the defendant's female employees. The Sixth Circuit held that this was proper because "the only difference between the later charge and . . . initial charge is the number of persons victimized. . . . As this later class-based claim brought by the EEOC could have reasonably been expected to grow out of Ms. Grimes' individual complaint of discrimination, no new additional proceedings were necessary." *See id.* at 1101.[8] Because all of the allegations in this case involve the operation of defendant's LIB and pension plans, Westinghouse could "reasonably have expected" the additional charges in the EEOC's second and third letters of violation to grow out of the initial Slackway charge regarding denial of LIB.

Westinghouse's arguments in effect urge that the Commission must thoroughly investigate and present all charges at the outset of the conciliation process, and that the filing of a court complaint bars all further investigation, conciliation, or development of the case. I disagree. The EEOC does not have to conduct an exhaustive investigation before it may act. *See e.g., Marshall v. Hartford Fire Insurance Co.*, 78 F.R.D. 97 (D.Conn.1978).

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[8] *EEOC v. KECO Industries* is a Title VII case, but its principles also apply to the ADEA. The ADEA and Title VII are parallel statutes; the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *Hodgson v. First Federal Savings & Loan Association*, 455 F.2d 818, 820 (5th Cir. 1972).

> An independent requirement of exhaustive investigations would reward the employer who discriminates on a large scale and undermine the legislative goal of obtaining voluntary compliance in these cases. The large scale discriminator would present the Secretary with an onerous and costly burden of investigation if the Secretary were required to prove each individual case of discrimination. Because a limited number of investigators is available, such a burden would frustrate the Secretary's ability to attempt conciliation in many cases.

See Marshall v. Sun Oil Co. (Delaware), 605 F.2d at 1334-35. In sum, "[t]o allow the employer an opportunity to answer its allegations, the Department should reveal its basis for making them, even though that basis is only circumstantial evidence. But the Secretary has no obligation to 'prove' to the employer that he has committed acts of discrimination." *Marshall v. Hartford Fire Insurance Co.*, 78 F.R.D. at 105.

It is important to " 'evaluate one party's efforts with an eye to the conduct of the other party.' " *See EEOC v. Prudential Federal Savings and Loan Association*, 763 F.2d at 1169 (quoting *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1335 (5th Cir.1979)). In this case, defendant rejected the EEOC's first conciliation proposal. Defendant did not even respond to the second and third conciliation offers.

In fact, the evidence suggests that Westinghouse never gave serious consideration to the possibility of conciliation. Mr. Saltman, Chief Counsel for Human Resources for Westinghouse, testified that he decided that the EEOC was acting in bad faith and was conducting a "sham conciliation, investigation and determination process. . . ." *See* T. Sept. 10 at 65 l. 7-10. This arrogant attitude shot down plaintiff's efforts toward conciliation.

Westinghouse simply chose to play hardball. It took the position that it had not violated the ADEA, *see id.* at 56-66; P.Ex. 4C. Given the Company's position, the EEOC appropriately acted. "[C]ourts have held that the Secretary is not required to continue conciliation efforts after the defendant has stated that it believes it has not been guilty of wrongdoing but may proceed to litigation to determine that issue." *See Marshall v. American Motors Corp.*, 475 F.Supp. 875, 879 (E.D.Mich.1979).

3. The Statute of Limitations And Relation Back Of Amended Complaints

Westinghouse's third affirmative defense is that the claims asserted in the EEOC's amended complaints are barred by the statute of limitations.[9] The EEOC argues

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[9] The EEOC's original complaint was filed on November 12, 1983. That complaint concerned Westinghouse's denial of LIB to named individuals "and all other terminated or laid-off employees aged 60 and older who were eligible for early retirement benefits and or received early retirement benefits." On August 23, 1984, the EEOC filed its first amended complaint. The amended complaint alleged the following violations of the ADEA at Westinghouse's Lester, and Concordville, Pennsylvania facilities:

(1) denying layoff income benefits to employees laid off prior to July, 1982 who were eligible for any type of retirement;

(2) after July, 1982, giving laid off employees the option of selecting either LIB or retirement, but not both;

(3) forcing laid off employees to retire prior to age 70 because LIB was not available;

(4) denying early retirement to laid off employees who chose LIB;

(5) denying recall to work to employees who were laid off and forced to retire; and

(6) giving lower retirement benefits to laid off employees who were not eligible for retirement because of age at the time of their layoff, but who later became qualified for retirement benefits.

The EEOC filed its second amended complaint on September 25, 1984. That complaint reiterated the six violations set forth in the first amended complaint, but alleged that they were nationwide.

that these claims "relate back" to its original complaint and are therefore within the statute of limitations.

The amended complaints in this case pose two problems. First, I must determine whether the EEOC is barred from adding the five new issues that appeared in its first and second amended complaints. Second, I must determine whether the EEOC is barred from broadening the scope of the case to a nationwide challenge, in effect adding new plaintiffs. I conclude that neither the additional allegations nor the broadened scope are barred by the statute of limitations.

Under Rule 15(c) of the Federal Rules of Civil Procedure, an amended complaint that would otherwise be barred by the statute of limitations is considered timely if it "relates back" to the original complaint. Relation back is permitted whenever "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." *See* Fed.R.Civ.P. 15(c). Rule 15(c) is liberally interpreted and applied. *See Unicure, Inc. v. Thurman*, 97 F.R.D. 1, 6 (W.D.N.Y. 1982).

Standards for the application of Rule 15(c) ensure defendants of notice of the conduct that is ultimately challenged in court. *See Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259-60 n. 29 (9th Cir.1982), *cert. denied*, 459 U.S. 1227 (1983). Fair notice of the general fact situation at issue is deemed sufficient. *See* 3 J. Moore, Moore's Federal Practice ¶ 15.15[3] (2d ed. 1985).

Thus, under the rule's "conduct, transaction, or occurrence" test, "an amendment need only spring from the same core event or transaction as that set out in the original complaint," *see Drakatos v. R.B. Denison, Inc.*, 493 F.Supp. 942, 845 (D.Ct.1980). The addition of new theories of recovery similarly is permissible when the new

claims are not "based on events different from or in addition to those set out in the original complaint." *See Baruah v. Young*, 536 F.Supp. 356, 364 (D.Md.1982); *see also Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982).

The concept of notice also guides the addition of parties. "In deciding whether an amendment relates back to the original claim, notice to the opposing party of the existence and involvement of the new plaintiff is the critical element." *Avila v. Immigration and Naturalization Service*, 731 F.2d 616, 620 (9th Cir.1984). Thus, relation back depends upon whether defendants "[a]t some point . . . have notice of who their adversaries are." *Leachman v. Beach Aircraft Corp.*, 694 F.2d 1301, 1309. Such notice exists when there is an identity of interests between the old and new plaintiffs. *See id.*; *see also* 3 J. Moore, *supra*, at 15.15[4.-2].

I find that the issues added in the EEOC's first amended complaint relate back to the original complaint. Like the original complaint, the five allegations added in the EEOC's first amended complaint are concerned with defendant's denial of LIB to persons eligible for retirement. Thus, they involve the same "transaction, occurrence, or core events" that appeared in the original complaint.

I find that the expansion of the scope of the litigation in the EEOC's second amended complaint also relates back to the original complaint. Westinghouse knew that its severance pay plans were targeted by the EEOC. These plans were in effect nationwide. Thus, Westinghouse knew that the Commission's challenge could apply to any and all of its facilities. Similarly, to the extent that the expansion of the case added new parties on the plaintiff's side, the new and the old parties have an identity of interest; namely, claims arising out of defendant's

severance pay plans. Westinghouse thus had reason to know that any employee affected by the challenged policies was a potential party to this case.

In sum, the issues and interests have remained the same throughout this litigation. The heart of the matter is the legality under the ADEA of defendant's severance pay, pension, and retirement programs.[1] I will now consider those programs.

The Validity Under the ADEA of Westinghouse's Severance Pay, Retirement, and Pension Plan Arrangements

The standards for determining whether an employer has engaged in age-based employment discrimination are borrowed from Title VII jurisprudence, *see Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir. 1983), *cert. denied*, 464 U.S. 937 (1983). Plaintiffs may proceed under two theories. Under the disparate treatment theory of discrimination, plaintiffs must demonstrate intentional discrimination; that is, that an employer expressly applies age-based standards in its treatment of employees. *See id.* at 117. Under the disparate impact theory of discrimination, plaintiffs must demonstrate that an employer's application of facially neutral criteria disproportionately and adversely affects older employees, and cannot be justified by business necessity. *Id.*

The EEOC's challenge of seven separate Westinghouse policies presents four legal issues. These are:

(1) whether Westinghouse's denial of LIB and MSA to laid off, retiring employees violates the ADEA;

(2) whether ARP I and ARP II violated the ADEA;

(3) whether Westinghouse's limitation of retirement benefits to employees actually eligible for retirement at the time of layoff, and its limitation of death prior to

retirement benefits to spouses of employees actually eligible for the benefits at the time of death, violates the ADEA; and

(4) whether Westinghouse's impact number process violates the ADEA.

The first three issues fall within disparate treatment analysis, while the last issue falls within disparate impact analysis. I will begin with the three disparate treatment issues.

The Disparate Treatment Issues

Under the disparate treatment theory of discrimination, the plaintiff ultimately must demonstrate that the defendant engaged in purposeful or intentional discrimination. *Id.* This task is customarily broken down into several steps. *See id.* at 117-18; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (pattern of proof of disparate treatment).[10]

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[10] *McDonnell Douglas Corp. v. Green* involved a Title VII claim of intentional race discrimination. The Court set forth the basic pattern of proof giving rise to an inference of discrimination. Under this pattern, a plaintiff can establish a prima facie case by showing:

> (1) that he belongs to a racial minority,
>
> (2) that he applied for and was qualified for a job for which the employer was seeking applicants,
>
> (3) that, despite his qualifications, he was rejected, and
>
> (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

While *McDonnell Douglas* embodies the classic pattern of proof of employment discrimination, it does not rigidly constrain the form of Title VII or ADEA cases. It is merely one way of establishing "an inference of discrimination . . . because the conduct at issue is presumed to be based on consideration of impermissible factors in

"[T]he plaintiff has the initial burden to establish a prima facie case of unlawful discrimination by a preponderance of evidence." *See Massarsky*, 706 F.2d at 118. This may be done by direct or circumstantial evidence. *See Maxfield v. Sinclair International*, 766 F.2d 788-91 (3d Cir. 1985). Once the plaintiff has established a prima facie case, the employer's burden is to "dispel the adverse inference" by "articulating 'some legitimate, non-discriminatory reason'" for its actions. *See Massarsky*, 706 F.2d at 118 (quoting *McDonnell Douglas*, 411 U.S. at 802). Once the employer has made this articulation, "the plaintiff must then prove that the asserted reason was merely a pretext for unlawful discrimination." *Id.*

The ultimate burden of persuasion is at all times with the plaintiff. *Id.* Thus, an ADEA plaintiff must show either that age was a determinative factor in the employer's decision, *Smithers v. Bailar*, 629 F.2d 892, 897-98 (3d Cir.1980), or that the employer's policy is discriminatory on its face. *Massarsky*, 706 F.2d at 119.

Finally, the employer may escape liability under the ADEA if it can demonstrate that its policy is within one of the statutory exceptions. These exceptions provide affirmative defenses to an employer who would otherwise be found to have engaged in age-based discrimination.[11]

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the absence of another explanation." *Smithers v. Bailar*, 629 F.2d 892, 895 (3d Cir. 1980). The nature of the showing that will create such an inference varies upon the circumstances of each particular case. *See Massarsky v. General Motors*, 706 F.2d 111, 118 n.13 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983). Thus, the *McDonnell Douglas* formulation has been adapted to a number of different fact patterns under both Title VII and the ADEA.

[11] Exceptions to the ADEA provide five affirmative defenses. These are: the "bona fide occupational qualification" defense, "reasonable factors other than age" defense, "bona fide seniority system" defense, "bona fide employee benefit plan" defense, and "discharge for good cause" defense. *See* 3 A. Larson & L. Larson, *Employment Discrimination* § 100.00 (1984).

See Trans World Airlines v. Thurston, —— U.S. ——, 105 S.Ct. 613, 622 (1985).

1. Denial of Severance Pay to Retiring Employees

This issue embraces Westinghouse's pre-July, 1982, LIB and pension plans, its post-July, 1982, LIB and pension plans, and its MSA and managerial pension plans. The validity of these programs depends on whether the ADEA permits denial of severance pay to laid off employees who retire and take their pension benefits.[12]

I find that Westinghouse's denial of severance pay to employees who take retirement is age-based discrimination.[13] Defendant's programs give employees who are eligible for retirement no practical choice but to take retirement benefits and forego severance pay. Therefore, receipt of severance pay is conditioned upon non-retirement status, and laid off workers are treated differently on the basis of age.

Westinghouse asserts that its programs have a "legitimate, non-discriminatory" justification. This justification is defendant's purported policy against "double dipping"

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[12] The post-July, 1982, program provides laid off employees with an option between LIB and pension benefits. In practice, this "option" is not a practical choice for employees, because selection of LIB means forfeiture of insurance and medical benefits. *See, e.g.*, T. Sept. 5, 132-133; Sept. 6, 7-9, 79-82. In any event, provision of the option does not alter the fact that older employees cannot receive both LIB and their full pension benefits. The option feature therefore does not correct the program; rather, Westinghouse devised the "option" as a sham to prolong the litigation of this issue.

[13] In *EEOC v. Westinghouse*, 725 F.2d 211 (3d Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 92 (1984), the Third Circuit found that the EEOC had established a case surviving summary judgment that the Company's pre-July, 1982, program violated the ADEA. On that record, the Court rejected the assertion that the plan was based on reasonable factors other than age or a bona fide benefit plan. *See id.* at 222-23. The case was remanded. *See id.* at 225.

into Westinghouse benefit programs.[14] According to Westinghouse, its benefit programs are designed to ensure each laid off employee a "stream of income"; however, each income stream may flow from only one source. Defendant thus argues that severance pay is not denied on the basis of age but on receipt of an income stream in the form of pension benefits.

This policy allegedly has existed since the 1960 inception of LIB. Westinghouse's Director of Compensation Benefits and Human Resources Program testified that "[t]he LIB plan never intended to have any relationship to retirees who had already been provided by the company with an income stream. We were not interested in providing the doubledip in the corporate coffers for retirees." *See* T. Sept. 5 at 64 l. 10-14.

I do not believe defendant's doubledipping rationale, because it is inconsistent. Specifically, the severance pay plans make an exception for employees age 59 with more than 10 but less than 30 years of service. If an employee in this category is laid off, he or she may receive LIB until attaining age 60.[15] At age 60, the employee can take full early retirement benefits, including medical insurance and a supplementary pension. *See* Jt.Ex. 13 at 4; Jt.Ex. 14 at 7. This arrangement is contrary to the alleged doubledipping rule. No such arrangement is provided for 57 year old employees with 30 years of service, who are one year shy of eligibility for selected retirement. Defendant supports its treatment of the 57 year olds with the alleged doubledipping rule. *See* T. Sept. 5 at 65-72.

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[14] Westinghouse apparently did not offer the doubledipping rationale to the Third Circuit. *See EEOC v. Westinghouse*, 725 F.2d 211 (3d Cir. 1984) (no mention of doubledipping argument); *see also* T. Sept. 4 at 65 l. 4-18 (statement of Westinghouse counsel that issue was not before Third Circuit).

[15] The LIB may not, however, be taken in lump sum form. *See* Jt.Ex. 13 at 4; Jt.Ex. 14 at 7.

Westinghouse attempts to explain this inconsistency by arguing that the exception for 59 year olds is a result of collective bargaining. It also insists that the exception is not doubledipping. *See* T. Sept. 5 at 66-67. This explanation does not wash. The collective bargaining process does not protect invalid plans, *see* 29 U.S.C.A. § 623(c). Moreover, Westinghouse's insistence that the 59 year olds do not doubledip, but the 57 year olds would, makes no sense.

Another inconsistency is defendant's assertion that severance pay "provide[s] the income stream only when [the employee] did not have an income stream from some other source," *see* T. Sept. 5 at 63 1, 18-25. In reality, severance pay is available to employees who have other sources of income. For example, if employees elect not to receive severance pay during the 12 month period after layoff, and obtain other employment during that period, they can still receive severance pay at the end of the period. *See id.* at 50 1. 7-18.

The doubledipping rationale is nonsense. Its unstated premise is that severance pay and pension benefits are fungible. In actuality, they are distinct benefits with different purposes. Severance pay is a short term separation allowance. It affords an employee breathing room to think through his situation and alternatives, and provides time to seek new employment without starving. In contrast, the pension is a provision for long term retirement. In short, severance pay is a fringe benefit related to length of service and the occurrence of a layoff. *See EEOC v. Westinghouse*, 725 F.2d at 224-25; *cf. EEOC v. Bordens, Inc.*, 724 F.2d 1390, 1396-97 (9th Cir.1984) (Borden's severance pay policy was a "simple fringe benefit" rather than a part of its retirement and pension benefits package). Pension benefits are not a substitute for severance pay.[16]

[16] Westinghouse itself recognizes the distinction between severance pay and pension benefits. In reference to MSA and PRIP,

Westinghouse denies that its policy discriminates on the basis of age. Defendant asserts that the criterion for receipt of severance pay is not age but non-retirement status. I reject this argument. Age and retirement are, in fact, so closely linked that a criterion based on one is a criterion based on the other. *See EEOC v. Bordens, Inc.*, 724 F.2d 1390, 1393 (9th Cir.1984) (rejecting a severance pay arrangement similar to Westinghouse's); *EEOC v. Curtiss-Wright Corp.*, 34 Empl. Prac.Dec. ¶ 34,483 (CCH) (D.N.J.1982) (age is a determinative factor when severance pay is based upon retirement status).

Massarsky v. General Motors Corp., upon which defendants rely, is distinguishable. *Massarsky* upheld a policy which insulated from layoff employees enrolled in an academic work-experience program. Although participants in the program tended to be young employees, the Court found that "[t]here is nothing to indicate that older persons were precluded from becoming GMI students. . . . We simply cannot infer that the Company was using student status as nothing more than a proxy for age. . . ." *Massarsky*, 706 F.2d at 119. In contrast, this case invites such an inference. Retirement status is not an age-neutral factor. Unlike enrollment in the GMI program, it is related solely to age.

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managerial employees were told "[t]hey are not a party of any contract of employment and no employee shall have any legal or other right to benefit under the plans." *See* Jt.Ex. 20 at 2. This characterization clearly differentiates MSA from pension benefits.

The fact that LIB and MSA are fringe benefits not required to be provided does not mean that Westinghouse may discriminatorily distribute them. *See Hishon v. King & Spalding*, —— U.S. ——, 104 S.Ct. 2229 (1984). "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Id.* at 2234; *see also Thurston*, 105 S.Ct. at 621 (applying *Hishon* to ADEA context).

Finally, Westinghouse invokes the bona fide employee benefit plan defense. *See* 29 U.S.C.A. § 623(f)(2). An employer claiming this defense must establish three things. These are: (1) that the employer was acting in observance of the terms of (2) a bona fide employee benefit plan (3) which is not a subterfuge to evade the purposes of the ADEA. *See Westinghouse*, 725 F.2d at 223. I conclude that Westinghouse has not established the second and third elements of the defense.

The second element requires the plan observed to be "a bona fide employee benefit plan." This generally means that the plan must exist and pay substantial benefits, *see EEOC v. Bordens, Inc.*, 724 F.2d at 1395 (citing *Marshall v. Hawaiian Telephone Co.*, 575 F.2d 763, 766 (9th Cir.1978)). Although the Westinghouse plans exist and involve real monetary benefits, its severance pay programs are not "employee benefit plans" within the meaning of the ADEA. *See Westinghouse*, 725 F.2d at 224-25. Severance pay lacks the characteristics of true employee benefit plans. *See id.* at 224; *Bordens*, 724 F.2d at 1396. The severance pay and pension plans interact, but this does not mean they integrate. *See Westinghouse*, 725 F.2d at 225. A fringe benefit cannot be made part of a bona fide employee benefit plan, as here, "simply by artificially trying to tie the benefit to such a plan." *See Alford v. City of Lubbock*, 664 F.2d 1263, 1272 n. 12 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (analyzing denial of sick leave pay to employees not covered by state retirement plan).

Even if severance pay could be considered part of an employee benefit plan, Westinghouse has not established the third element of the bona fide employee benefit plan defense. Relying on *United Air Lines v. McMann*, 434 U.S. 192 (1977), defendant argues that its plan cannot be a subterfuge because it pre-exists the ADEA. *McMann* held that Congress did not intend to invalidate retirement plans that pre-date the ADEA, *see id.* at 203. The con-

tinued vitality of *McMann* is unclear.[17] *See* 1 H. Eglit, *Age Discrimination* § 16.-36 (1985). To the extent that *McMann* still has force, Westinghouse misapplies it. I therefore reject defendant's argument.

First, *McMann* does not insulate post-Act modifications of benefit plans. *See EEOC v. Home Insurance Co.*, 672 F.2d 252, 259 n. 9 (2d Cir.1982); *Sikora v. American Can Co.*, 622 F.2d 1116, 1124 (3d Cir.1980). Such modifications can be subterfuges. *See Home Insurance Co.*, 672 F.2d at 259. Westinghouse's plans have undergone negotiation, adjustment, and consideration many times since the passage of ADEA. It is therefore incorrect to characterize them as bona fide under *McMann*. They are, in fact, a subterfuge to evade the Act's proscription of age discrimination.

Second, defendant's *McMann* argument proves too much. It is true that an employer cannot intend to evade a non-existent law; thus, pre-Act conduct cannot be a subterfuge. This would be true even if the employer was in fact discriminating against older employees.[18] Once a law is in existence, however, the employer is aware of its prohibitions. Post-Act reaffirmation of prior discriminatory practices, such as defendant's, therefore amounts to evasion of the Act. This is not to say that an employer

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[17] When Congress amended the ADEA in 1978, it explicitly rejected *McMann*. *See* H.R.Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S.Code Cong. & Ad.News 528, 529. The conferees "specifically disagree[d] with the Supreme Court's holding and reasoning in that case." *Id.* The conferees also expressed their belief that "[p]lan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments." *Id.*

[18] This is not the same as saying that pre-Act plans necessarily were free of discriminatory purposes. Intention to discriminate does not arise simultaneously with a law; rather, the law recognizes it as illegal.

must predict which details of its plans would be declared violations of the Act if challenged in court. Nonetheless, it is too much to say that any pre-Act practice can *never* be a subterfuge simply by virtue of its continuation, with few or no changes, after passage of the ADEA.

In sum, I am not persuaded by Westinghouse's purported "no doubledipping" rationale; instead, I find that it is a pretext for discrimination on the basis of age. I also find that Westinghouse cannot invoke the ADEA's "bona fide employee benefit plan" exception. I therefore conclude that Westinghouse's denial of severance pay to retiring, laid off employees violates the ADEA.

The Legality Under the ADEA of ARP I and II

The ADEA prohibits mandatory retirement prior to age 70. *See* 29 U.S.C.A. §§ 623(f), 631(a).[19] This prohibition extends to forced retirements. It also extends to unlawfully induced "voluntary" retirements. *See* B. Schlei & P. Grossman, *Employment Discrimination Law*, 519 (2d ed. 1983). "If pressure, subtle or otherwise, is used to encourage 'voluntary' retirement, liability may result." *Id.* The EEOC asserts that ARP I and ARP II illegally induced employees to retire. This argument has two components. First, the EEOC contends that employees would not have participated in ARP if they could have received both pension benefits and severance pay. Second, the EEOC contends that employees were induced to participate in ARP because of the manner in which defendant notified them of layoff and informed them of their options.

To the extent that the first component of the argument complains of employees' inability to obtain both severance

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[19] This is subject to an exception for employees who, for at least two years prior to the retirement, were in executive or high policy-making positions, provided that they receive a minimum level of pension benefits. *See* 29 U.S.C.A. § 631(c)(1).

pay and pension benefits, I have already determined that the practice is illegal. The remaining portions of plaintiff's argument present the contention that the company unlawfully induced employees to participate in ARP and retire.[20]

The legality of providing enhanced benefits to encourage early retirement is not always clear. *See* 1 H. Eglit, *supra*, at § 16.39B (Supp. Aug. 1985). Nonetheless, plans such as ARP I and II, which provide benefits to encourage early retirements and thereby forestall layoffs of younger workers, are permitted. *See, e.g., Patterson v. Independent School District #709*, 742 F.2d 465 (8th Cir.1984); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 420 & n. 4 (9th Cir.1981); *Mason v. Lister*, 562 F.2d 343 (5th Cir.1977). Such enhanced benefit plans do not give employers "the power to forcibly retire older workers," and are not subterfuges to evade the Act. *See Mason*, 562 F.2d at 346. They are "strictly optional with the employees." *See id.*

On the record in this case, the ARP provisions are protected by the ADEA's exemption of bona fide pension plans. The coercion here lay not in the availability of ARP benefits but in the denial of severance pay.

The Restriction of Death Prior to Retirement Benefits And Retirement Benefits to Employees Actually Eligible at the Time Of Death Or Layoffs

The EEOC claims that it does not challenge Westinghouse's minimum age and service requirements for receipt of death prior to retirement benefits and regular retirement benefits. Instead, the Commission claims to challenge the manner in which the minimum requirements are applied. In the Commission's view, Westinghouse

[20] The ARP issues received sparse treatment in both the record and the post-trial briefs. I find that plaintiff did not meet its burden of proof on this record.

should continue to confer such benefits on employees who actually meet both criteria at the time of death or retirement, and *also* should confer such benefits on employees who die or are laid [sic] with minimum years of service but without the minimum age. The Commission proposes that these employees, or their spouses, should begin to receive such benefits when the employees would have met the minimum age requirements if they had not died or been laid off. The Commission contends that any other arrangement is illegal under the ADEA because it would impose an age-based penalty upon employees who involuntarily end their employment with Westinghouse. In short, the Commission attacks the minimum age requirements of the benefit plans, while pretending not to do so.

While there appears to be no authority directly addressed to this specific contention, this is probably attributable to the fact that such a farfetched argument has never before been raised. The short answer to the EEOC's contention is that the defendant's arrangements are protected by the ADEA's exemption of bona fide pension plans. Every retirement plan contains some age-based distinctions which are necessarily "arbitrary." For example, a retirement plan providing benefits at age 70 would "discriminate" against 65 year old employees. The ADEA exemption for bona fide pension plans permits such legitimate line drawing. *See* S.Rep. No. 493, 95th Cong., 2d Sess. 9-10, *reprinted in* 1978 U.S.Code Corg. & Ad.News 504, 512-13; *cf. Christensen v. Equitable Life Assurance Society of the United States*, 767 F.2d 340, 342 (7th Cir.1985) (absent purposeful discrimination, a negative impact on pension benefits caused by early disassociation from employment is not discriminatory).

The Disparate Impact Issue: The Impact Number Process

The EEOC's [sic] challenges the impact number process under the disparate impact theory of discrimination. This theory invalidates facially neutral practices that

disproportionately affect a protected class unless the employer can justify the practice as a business necessity. *See Massarsky v. General Motors Corp.*, 706 F.2d at 117.

Proof of discriminatory motive is not necessary in a disparate impact case. *See Geller v. Markham*, 635 F.2d 1027, 1031 (2d Cir.1980), *cert. denied*, 451 U.S. 945 (1981). A prima facie case may instead be established by statistics "from which it may be inferred that an employer's . . . criteria" generate disproportionately adverse results. *See id.* at 1032. That is, the plaintiff must show that the practice has a " 'significantly discriminatory impact.' " *See Massarsky*, 706 F.2d at 120 (quoting *Connecticut v. Teal*, 457 U.S. 440 (1982)). Once a prima facie case has been established, the employer may defend its practice by demonstrating that it is justified by business necessity. *Id.* The plaintiff may then rebut the defendant's argument by showing that the employer's practice is a mere pretext for discrimination.

The disparate impact theory was developed under Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Westinghouse contends that the EEOC cannot proceed under the theory in the ADEA context. The Third Circuit has not ruled on this question, *see Massarsky*, 706 F.2d at 120 (declining to decide the issue). Nonetheless, other circuits have applied the disparate impact model to age discrimination cases. *See, e.g., EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir.1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir.1983); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

I am persuaded that disparate impact analysis under the ADEA is appropriate. As I have already noted, Title VII and the ADEA are parallel statutes, *see Lorillard v. Pons*, 434 U.S. 575 (1977); the disparate impact model should apply in both contexts. *See Borden's*, 724 F.2d at 1394-95; *see also Geller*, 635 F.2d at 1032; *Equal Em-*

ployment Opportunity Commission v. Governor Mifflin School District and Governor Mifflin Education Association, No. 85-0241, slip op. at 12-17 (E.D.Pa. Oct. 9, 1985).

Although I find the disparate impact model applicable, I do not find that this case fits the model. The Commission's statistical expert testified that "older workers who were employed at the time an impact number was announced were less likely to be covered by the impact number than were younger workers." T. Sept. 10 at 140 l. 19-22. Thus, the tendency for older workers to be laid off without an impact number was statistically significant. *Id.* at 148-49. Westinghouse argues that older employees were not disadvantaged by the system because their seniority insulated them from the reduction in force. The Company also argues that the process is based upon a bona fide seniority system and is therefore exempt from the ADEA. *See* 29 U.S.C.A. § 623(f)(2). The EEOC acknowledges the "*de facto* linkage" between the seniority system and the impact number process. In fact, it asserts that this linkage causes the process to have its discriminatory effects. *See* Plaintiff's Post-Trial Memorandum at 57. The Commission's factual analysis is correct, but its legal conclusion is not.

The linkage between the impact number process and the seniority system is what makes the impact number process a legitimate practice under the ADEA. The ADEA expressed a legislative desire to preserve seniority systems by tolerating such side effects. *See* S.Rep. No. 492, 95th Cong., 2d Sess. 9-10, *reprinted in* 1978 U.S.Code Cong. & Ad.News 504, 512-13. The ADEA's exception for seniority systems thus insulates the "last hired, first fired" practice that underlies defendant's impact number process.

The benefits of the impact number program may well be illusory. The EEOC's expert witness testified that

> the individuals who were covered by the impact number generally could not make much use of it because they did not meet the 15 year service requirements whereas individuals who were laid off after the impact number generally could have taken advantage of it in much larger numbers had they been included in the impact number reduction. It had the effect of giving impact numbers to those who couldn't use them and withholding impact numbers from those who could have used them to get . . . special benefits.

T. Sept. 10 at 152 l. 6-15. Nonetheless, the plan does not violate the ADEA. Delayed layoffs of older employees, which resulted in the unavailability of impact numbers for them, stemmed from the operation of a bona fide seniority system.

Willfulness

An employer's willfulness has two consequences under the ADEA. First, it triggers application of a three year statute of limitations. Second, it triggers availability of liquidated damages.

There has been some disagreement among the courts regarding the appropriate standard of willfulness. There also has been disagreement over whether the same standard should apply in both the statute of limitations and liquidated damages contexts. The Supreme Court recently clarified the standard of willfulness for liquidated damages, but declined to resolve whether the same standard should govern the statute of limitations. *See Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613, 625 & n. 21 (1985).

Under *Thurston*, an employer is liable for liquidated damages if " 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *Thurston*, 105 S.Ct. at 624. This standard requires more than a realization that the ADEA

might apply. It is therefore more favorable to employers than the "knew that the ADEA was 'in the picture'" standard formerly applied by some courts. *See id.* at 625. On the other hand, it does not require intentional violations. *See id.* at 624 n. 19. An employer will be liable for liquidated damages if it acted in " 'reckless disregard' of the requirement of the ADEA." *Id.* at 626.

The EEOC and Westinghouse agree that *Thurston* governs willfulness with respect to liquidated damages. They disagree, however, on whether *Thurston* also governs willfulness with respect to the statute of limitations. Plaintiff urges that the statute of limitations should be governed by the "in the picture" standard formulated in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir.1971), *cert. denied*, 409 U.S. 948 (1972). Defendant advocates uniform application of the *Thurston* standard.

I find that Westinghouse acted willfully under the *Thurston* standard.[21] There is ample evidence that Westinghouse "acted in 'reckless disregard' of the requirements of the ADEA." *Thurston*, 105 S.Ct. at 626.[22] De-

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[21] Since *Thurston*, the courts have not resolved whether the term willful carries more than one meaning in the ADEA. In the Third Circuit alone, the courts are divided. *Compare Equal Employment Opportunity Commission v. Governor Mifflin School District and Governor Mifflin Education Association*, No. 85-0241, slip op. at 7-11 (E.D.Pa. Oct. 9, 1985) (standards are different) *with Slenkamp v. Borough of Brentwood*, 603 F.Supp. 1298 (W.D.Pa. 1985) (standards are the same). The problem does not need to be resolved in this case. Because I find willfulness under the standard most favorable to defendant, it follows that Westinghouse is both liable for liquidated damages and subject to the three-year statute of limitations.

[22] Willfulness is an issue of fact. *See Slenkamp v. Borough of Brentwood*, 603 F.Supp. at 1302; *Marshall v. American Motors Corp.*, 475 F.Supp. 875, 883 (E.D.Mich. 1979). The burden of proof of willfulness for the purposes of liquidated damages is on the plaintiff. *See Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184

fendant has long had the ability and the resources to ascertain the law and to attempt compliance with it. It did not. Trial testimony established that the Westinghouse Human Resources Department employs knowledgeable in-house counsel with extensive experience in the field of employment discrimination. *See* T. Sept. 10, at 4-11. Counsel monitors the legality of Westinghouse policies and practices. *Id.* at 11-16. The Company provides counsel with the resources necessary to keep up with the law. *Id.* at 17-18. These facts alone do not indicate willfulness. Indeed, they might signify eagerness to comply with the law. Nonetheless, the evidence shows that the Company never seriously tried to comply with the ADEA. On the contrary, it ignored increasingly clear signs that its policies were illegal, and stubbornly resisted compliance.

In the face of successive letters of violation, Westinghouse failed to question or change its policies. When litigation ensued, Westinghouse still insisted on the validity of its policies. Westinghouse has every right to do this. On the other hand, its course of action suggests that it did not violate the ADEA by mere mistake. In fact, its denial of severance pay to older employees clearly violated the ADEA. Nonetheless, Westinghouse turned its

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(6th Cir. 1983); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981); 2 H. Eglit, *Age Discrimination* § 18.14 (1985).

There is some confusion with regard to who bears the burden of proof of willfulness for the purposes of the statute of limitations. *See* 2 H. Eglit, *supra*, at § 17.25. Some courts placed the burden upon the defendant by treating willfulness as an affirmative defense. *See, e.g., Marshall v. American Motors Corp.*, 475 F.Supp. at 883-84; *Marshall v. Eastern Airlines, Inc.*, 474 F.Supp. 364, 370 (S.D.Fla. 1979). This comports with "[t]he usual view . . . that statutes of limitations must be pleaded and proved as affirmative defenses. . . ." *See* 2 H. Eglit, *supra*, at § 17.26. Nonetheless, some courts place the burden upon the plaintiff. *See, e.g., EEOC v. Governor Mifflin School District*, slip op. at 10. Because I find plaintiff has established willfulness in this case, I need not resolve who actually bears the burden of proof.

face from "the handwriting on the wall" by ignoring successive judicial invalidations of plans similar to Westinghouse's. *See EEOC v. Bordens*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. City of Altoona*, 723 F.2d 4, 7 (3d Cir. 1983).

Westinghouse never attempted to modify its arrangements. *See* T. Sept. 10 at 18-20. In 1982, Westinghouse changed its policy and provided an option between LIB and pension benefits. In 1985, a similar change was made for management employees. The Company's motivation, however, was to prolong and ameliorate the predictable unfavorable outcome in litigation over the plans. *See* T. Sept. 10 at 98 1. 3-6 (1982 change); T. Sept. 6 at 142-43 (1985 change).

Finally, the Third Circuit's ruling in the New Jersey case afforded some suggestion that at least the pre-1982 severance pay arrangements violate the ADEA. Nonetheless, the company continues to defend those arrangements, primarily through its "no doubledipping" rationale. This rationale simply is not credible. Despite the fact that defendant characterizes it as a long-standing corporate policy, it was first articulated in this litigation. I believe that the articulation is belated because the policy never existed.

Perhaps the most telling evidence of the Company's willfulness is its own argument that it acted in good faith.[23] Westinghouse's good faith argument is two-fold. First, it insists that its post-1982 arrangements were designed in reliance upon statements of EEOC Counsel made in the New Jersey litigation. Second, it argues

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[23] *Thurston* made clear that good faith is not a defense to willfulness. *See Thurston*, 105 S.Ct. at 625 n.22. Nonetheless, it also made clear that good faith is relevant to the issue of willfulness. *See id.* at 626. Thus, the Court found that TWA did not act willfully, because "TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." *Id.*

that its pre-1982 arrangements were designed before enactment of the ADEA. It therefore concludes that it acted in compliance with what appeared to be the law.

I have already discussed and rejected these contentions. They are feeble excuses. Westinghouse has mounted a stubborn, protracted and futile defense of the indefensible policy of denying severance pay to its older employees because they were eligible for pensions. Westinghouse acted in reckless disregard of the requirements of the ADEA in its denial of severance pay benefits to older employees. Westinghouse resisted conciliation and tried to turn plaintiff's conciliatory approaches into a weapon of defense. When it became clear that denying severance pay to those eligible for pensions was going to be found illegal by the Courts, Westinghouse devised a sham option arrangement to evade the ADEA and claimed, without basis, that it was relying on a government lawyer's argument for its own tactical decision. Westinghouse belatedly invented an alleged corporate policy against doubledipping to justify denying older workers their severance pay. The circumstantial evidence is overwhelming that Westinghouse showed reckless disregard for the matter of whether its pre-July 1982, and post-July, 1982, layoff income benefits and management separation allowance benefits violated the ADEA. I therefore award double damages to the injured employees who fall within the three year statute of limitations.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Nos. 83-5457, 84-4799

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

WESTINGHOUSE ELECTRIC CORPORATION

ORDER

AND NOW, this 26th day of March, 1986, it is hereby ORDERED that Westinghouse, its employees, agents, successors and assigns are enjoined from denying the LIB and MSA severance pay benefits specified in the annexed Memorandum to employees aged 40 or over, who are otherwise eligible for them, because such employees are also eligible for, or elect to receive, pension or retirement benefits to which they are entitled.

This Court's declaratory judgment as to liability is hereby entered in favor of plaintiff and against defendant on the LIB and MSA issues and in favor of defendant and against plaintiff on the other claims, in accordance with the attached Memorandum, there being no just reason for delay.

U.S. Magistrate Edwin E. Naythons is designated to serve as a Master, pursuant to Title 28 U.S.C. § 636 (b)(2) and Rule 53, to make the difficult computation of damages, after receiving such evidence and holding such hearings as are necessary. The Master shall prepare and file a report with his findings of fact and conclusions of law in accordance with Rule 53(e).

This Order is stayed for ten days and pending determination of an appeal.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

RELEVANT STATUTES

1. Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. § 623(a)(1), provides that:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

2. Section 4(f) of the ADEA, 29 U.S.C. § 623(f), provides, in part, that:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a) . . . of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . .;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual . . . .

CASE SCHEDULED FOR ORAL ARGUMENT ON MAY 17, 1988

APPENDIX FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5361 & 87-5362

CLYDE J. ARNOLD, JR., *et al.*,
Appellees,

v.

POSTMASTER GENERAL,
Appellant.

CHARLES R. NETHERTON, *et al.*,
Appellees,

v.

POSTMASTER GENERAL,
Appellant.

Appeal from the United States District Court
for the District of Columbia

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C.A. Nos. 85-2571 & 86-2291

* * * *

II. Even If Disparate Impact Analysis Is Used, The District Court Erred In Finding That The Directed Transfer Component Of The Career Path Policy Has An Adverse Impact On Postal Inspectors Aged 40 And Above

A *prima facie* case of disparate impact is usually made through statistical evidence that a specific "facially neutral" employment practice falls more harshly on members of a protected group than on other employees. *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *Palmer* v. *Shultz*, 815 F.2d 84, 114 (D.C. Cir. 1987); *Contreras* v. *City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). Whether there exists a statistical disparity sufficiently significant to establish a *prima facie* case is a question of fact. Although a district court's factual findings may not be set aside by a reviewing court unless clearly erroneous (*see* Fed. R. Civ. P. 52), this rule does not apply to findings that result from the application of incorrect legal principles. *Palmer*, 815 F.2d at 101; *Trout* v. *Lehman*, 702 F.2d 1094, 1100 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984).

The heart of this action is whether the various components of the CPP should be analyzed as an integrated "package" under the *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), line of cases or as separate, discrete practices under the *Connecticut* v. *Teal*, 457 U.S. 440 (1982), line of authority. *Gilbert* treats the employment practice "package" as the proper analytical focus. 429 U.S. at 138. *Teal* forbids a defense that focuses on "bottom line" employment statistics without taking into account individual components of an employment practice that serve as absolute barriers from the rest of the process. This case definitely falls within the *Gilbert* analysis.

Appellees' disparate impact claim and the District Court's ruling thereon addressed solely the directed

transfer component of the Career Path Policy. In isolating the Level 23 directed transfer component from the rest of the CPP "package" and finding that such transfers have an adverse impact on Postal Inspectors aged 40 and over, the District Court erred as a matter of law.

A. Disparate Impact May Not Be Established By Isolating One Component Of An Integrated Multi-Component Employment Policy

The Career Path Policy consists of three interdependent transfer components: (1) voluntary transfers by Level 23 Inspectors; (2) bids by Level 21 Inspectors for promotion to vacant Level 23 positions; and (3) seniority-based directed transfers of Level 23 Inspectors. At trial, the Inspection Service introduced statistical evidence which showed that when all transfers—both voluntary and directed—are considered, the overall transfer requirement of the CPP fell relatively equally on Inspectors below age 40 and Inspectors aged 40 and above, in comparison with their average availability for transfer during the relevant time period.[18] In rejecting this evidence and relying instead on statistics which focused exclusively on the directed transfer component of the three-part Policy, the District Court erred as a matter of law.

The clear weight of authority establishes that an integrated employment policy or practice, like the CPP, may not be "balkanized" into its constituent parts in order to establish or defeat a claim of disparate impact. In *General Electric Co.* v. *Gilbert*, plaintiffs claimed that their employer's disability plan impermissibly discriminated on the basis of sex by excluding pregnancy from the non-

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[18] The statistics showed that Level 23 Inspectors aged 40 and above constituted 34.3% of all Level 23 Inspectors eligible for transfer into MMAs during the relevant period and constituted 33.8% of all Inspectors actually transferred either voluntarily or involuntarily under the Policy. (DX 28, A. 93).

occupational sickness and accident benefits provided to all employees. The Supreme Court declined to engage in an item by item analysis of General Electric's disability plan, and instead analyzed whether the disability "package" was discriminatory—that is, whether the overall benefits to employees or the "aggregate risk protection" worked to discriminate against any definable group. *Id.* at 138. In this regard the Court stated:

> The "package" going to relevant identifiable groups we are presently concerned with . . . covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not." . . . As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits . . . .

429 U.S. at 138 (citation omitted); *see California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 605-11 (1980) (rule that an employee must work 45 weeks in a calendar year to be considered permanent must be analyzed as part of a "seniority system" under Title VII).

This basic principle in *Gilbert* was noted in *EEOC* v. *Governor Mifflin School District and Governor Mifflin Education Ass'n*, 623 F. Supp. 734 (E.D. Pa. 1985), a disparate impact case arising under the ADEA. There, the EEOC alleged that the school district's salary system had a disparate impact on teachers aged 40 and over because older, more senior teachers at the top steps of the pay schedule received smaller salary increases than did younger teachers at the lower steps. Rejecting this claim, the district court held:

> [T]he defendants are essentially correct that it would be improper to focus too narrowly on a par-

> ticular aspect of something like a compensation system. Such a system is designed to provide employees with an overall package of payroll benefits. The precise manner in which this is accomplished will obviously vary widely. It is true that the teachers at the top of the step system received the smallest increases, but they also received the highest pay. It is only when the amount of the pay increase is separated from all other aspects of the compensation system, and the amount given to the older teachers as opposed to the teachers with less seniority is examined in isolation, that anything remotely unusual can be seen. I believe that this dissection of the compensation sytem is improper.

Id. at 40.[19]

As the foregoing cases demonstrate, the District Court's dissection of the CPP was improper as a matter of law. Under the CPP, *all* eligible Level 23 Inspectors, *regardless of age*, were required to serve five years in a Major Metro Area. Further, *all* eligible Level 23 Inspectors, *regardless of age*, were afforded the opportunity to volunteer for this mandatory service before being faced with the prospect of a directed transfer. Finally, directed transfers of Level 23 Inspectors, *regardless of age*, oc-

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[19] *Accord Smith* v. *Troyan*, 520 F.2d 492, 498 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) ("Carried to its logical extreme . . . [analysis of subtests] would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a "subtest" of the "subtest."); *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (showing that overall examination procedure produces disparate results cannot be rebutted by fragmenting process); *Vulcan Society of the New York Fire Department, Inc.* v. *Civil Service Commission*, 360 F. Supp. 1265, 1272 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) ("[T]he examination may not be truncated; whether or not it has an adverse discriminatory impact upon minority groups should be considered in terms of the total examination procedure.")

cured only if vacancies were not filled by volunteers or bids. Accordingly, the CPP "package" given to Level 23 Inspectors who were over 40 years of age contained the same "benefits" and "detriments" as the "package" given to those who were under 40 years of age. *See General Electric Co.* v. *Gilbert*, 429 U.S. at 138.[20] There were no disadvantages suffered by those who were over 40 that were not suffered by those who were under 40. Nor were there any benefits afforded to those who were under 40 that were not afforded to those over 40. *Id.* The transfer "package" cannot therefore be said to discriminate against Inspectors over 40 years of age. *Id.*[21]

The District Court rejected the "package" approach to the analysis of the CPP, claiming instead that appellees' challenge was *solely* to the directed transfer component of the Policy and *not* to the aspect of the Policy that permitted Inspectors to volunteer for lateral assignments. 667 F. Supp. at 20. However, the interrelatedness of the components and the necessity to treat the entire CPP as a package was confirmed by the District Court's own inability to keep the components of the Policy separate. Indeed, the District Court held that Inspectors aged 40 and over who *voluntarily* transferred had *standing* to challenge the *directed* transfer component of the CPP because these Inspectors "were forced to volunteer for a lateral reassignment to an undesirable major metropolitan area to avoid a directed transfer to an even less desirable major metropolitan area." 667 F. Supp. at

[20] The only difference between the "packages" was one that in fact *favored* those in the protected class. As previously discussed, Inspectors within five years of retirement, and thus, aged 45 years or older, were exempt from the transfer Policy.

[21] Age discrimination should not be found to exist simply because Inspectors 40 and over chose to volunteer for transfers at a lower rate than those under 40. *See* n.8, *supra*. By exercising this option, the 40 and over group necessarily subjected themselves to greater incidences of directed transfers.

17.[22] Thus, as the District Court ruled, and as individual class members themselves testified, "voluntary" transfers were factually indistinguishable from directed transfers under the Policy. Having so found, the conclusion that the voluntary and directed transfer components of the CPP must be analyzed statistically as a package is inescapable.

The District Court's additional conclusion that "discriminatory transfers of some Level 23 Postal Inspectors cannot be justified by its exemption of other Level 23 Postal Inspectors," is also misplaced. 667 F. Supp. at 20. In so ruling, the District Court not only continued its improper focus on a single component of this integrated employment policy, but also apparently confused the Inspection Service's statistical case with the "bottom line" approach rejected in *Teal* v. *State of Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982). Far from precluding appellant's statistical argument, *Teal* lends further support to the Inspection Service's case.

In *Teal*, plaintiffs challenged a written examination as having a disparate impact on black applicants for certain supervisory positions with a Connecticut state agency. The state defended on the basis that, because the actual promotion rate for black candidates was higher than that for white candidates, plaintiffs could not prevail on a claim of disparate impact by separately challenging the written examination. The Second Circuit rejected this defense and the Supreme Court affirmed. The Court stressed that the principal focus of Title VII was the

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[22] Quite obviously, the same concerns that "forced" some Inspectors 40 years of age and over to voluntarily transfer also impelled Inspectors under 40 to seek voluntary reassignment. Indeed, the Inspection Service introduced evidence that 96% of those volunteering either were eligible or would have been eligible for directed transfers had they not volunteered. (DX 28, Chapter 4; A 93; TR 277-79).

protection of individual opportunities, not class rights. 457 U.S. at 451, 453-56. Limitation of the opportunities of one group of individuals could not be excused by favorable treatment of another group of the same class. *Id.*

In *Teal*, one group of black individuals was absolutely barred from promotion because of the employer's use of a discriminatory test, while another, separate group of blacks was given favorable treatment in promotion. There was no overlap between the two groups; those who failed the test were ineligible for favorable treatment when the actual promotion selections were made. The Second Circuit had recognized this factor in distinguishing its earlier decision in *Kirkland*:

> While we noted in *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), that proof concerning the disparate impact of certain sub-tests was of "little relevance . . . on the issue of whether or not the examination as a whole had an unconstitutional discriminatory impact," there, the passing grade was dependent upon the cumulative results of the sub-tests. Thus, all of the candidates in *Kirkland* were exposed to the challenged selection device in its entirety, and therefore, were able to benefit from the components of the exam that apparently offset the allegedly discriminatory sub-test. In other words, all of the candidates in *Kirkland* were subjected to the complete selection process, which, when viewed as a whole, did not produce unlawful disparate results.

645 F.2d at 137-38.[23]

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[23] *See Sengupta* v. *Morrison-Knudson*, 804 F.2d 1072, 1077 (9th Cir. 1986); *Brunet* v. *City of Columbus*, 642 F. Supp. 1214, 1224-25 (S.D. Ohio 1986), *appeal dismissed without op.*, 826 F.2d 1062 (6th Cir. 1987); *Contreras* v. *Carlin*, 38 FEP Cases 1328, 1332 (C.D. Cal. 1985).

The Supreme Court affirmed the Second Circuit's further distinction between those types of cases in which dissection of an employment practice or policy would be inappropriate and those cases in which such dissection is permissible:

> Where all the candidates participate in the entire selection process, and the overall results reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would, indeed, "conflict[] with the dictates of common sense." . . . Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain.

Id. at 138 (citation omitted). Accordingly, as the Supreme Court repeatedly emphasized in its opinion, in the latter type of case where certain individuals are *not* being exposed to the entire process, but instead, are being eliminated from further consideration based on a particular component of the process, that component of the process can in fact be segregated for independent analysis. Only under such circumstances, however, is it appropriate to analyze a component of an employment practice in isolation. 457 U.S. at 145-46.

There is little doubt that this case falls squarely within the class of cases identified in *Teal*, and discussed *supra* at pp. 26-28, where examination of an isolated segment of the CPP "conflict[s] with the dictates of common sense." 645 F.2d at 138. As previously discussed, *all* Level 23 Inspectors were exposed to and "affected by" the entire CPP transfer procedure. (*See* p. 6-7, *supra*). Unlike *Teal*, the directed transfer component of the Policy did not represent a barrier which excluded any identifiable group of individuals from exposure to the rest of the process. To the contrary, as the trial testimony

confirms, those Inspectors who were ultimately subject to directed transfers had the opportunity to volunteer, but chose instead to forego this option.[24] Moreover, since transfers were not directed until all other means of increasing the experience level in MMAs under the CPP had been exhausted, those subject to directed transfers benefitted from the other components of the CPP by being able to delay their transfers until later in their careers. Indeed, at least one Inspector testified that, based on periodic notification he received from the Inspection Service regarding his ranking on the directed transfer seniority list, he was able to manipulate and delay the timing of his transfer to Washington, D.C. for several years. (Tr. 37-40).[25] In short, the evidence proffered by appellant clearly was not the class-wide "bottom line" analysis offered at the expense of individual victims of discrimination that was rejected by the Supreme Court in *Teal*.

This case plainly falls within the rationale discussed in the *Gilbert* line of cases, and is not undermined by *Teal*. In this case, all Inspectors were subject to the same transfer choices under the CPP regardless of their ages. Further, it is only when the directed transfer component is examined apart from the rest of the Policy that any impact on Inspectors 40 and over is observed at all. *See EEOC* v. *Governor Mifflin*, *supra*. Appellees' statistical analysis of the directed transfer component in isolation is thus legally insufficient to establish a disparate impact case. The District Court's acceptance of this approach constitutes reversible error.

* * * *

[24] Those Inspectors gave up the ability to have input into the timing and location of their transfers in favor of delaying the inevitable as long as possible.

[25] An Inspector who transfers to an MMA later in his career rather than earlier would necessarily be earning more money at the time of transfer. This may be viewed as an additional benefit to some in view of the higher cost of living in the MMAs. (DX 9A-C).

IV. The District Court's Finding That The Career Path Policy Was Designed Intentionally To Discriminate Against Inspectors Aged 40 and Above Results From The Application Of Incorrect Legal Principles And Is Clearly Erroneous

In concluding that appellee Inspectors had carried their burden of establishing a claim of disparate treatment, the District Court found that the statistical correlation between age and seniority coupled with the Inspection Service's knowledge of the alleged disparity created an inference of intentional discrimination. 667 F. Supp. at 27. The Court next rejected appellant's attempt to rebut any inference of discrimination by concluding that the justification offered by the Inspection Service for the senior-first rule was not a legitimate, nondiscriminatory reason, or alternatively, that the reason proffered was shown to be pretextual. *Id.* at 27-28.[33] The District Court's conclusions on these issues should be reversed.

First, it is important to note at the outset that intent to discriminate is a critical element in a disparate treat-

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[33] The Court also held that the Inspection Service "willfully" violated the ADEA, based on its factual finding that the Inspection Service designed the senior-first transfer rule with the intent to discriminate against Postal Inspectors aged 40 and over. In reaching this conclusion, the Court relied on the same analysis that it made in the disparate impact case. This sort of analysis has been rejected as an insufficient ground to justify a finding of willfulness. *Gilliam* v. *Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987). Moreover, the finding of a willful violation is clearly erroneous for the same reasons that the finding of intentional discrimination is erroneous. In any event, courts have found that the liquidated damages awardable to claimants for willful violations of the ADEA are not available to federal sector employees. Thus, the willfulness standard may not be applied in a federal age discrimination case brought pursuant to 29 U.S.C. § 633a. *See Smith* v. *Office of Personnel Management*, 778 F.2d 258 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986); *Chambers* v. *Weinberger*, 591 F. Supp. 1554 (N.D. Ga. 1984); *Wilkes* v. *United States Postal Service*, 548 F. Supp. 642 (N.D. Ill. 1982); *Muth* v. *Marsh*, 525 F. Supp. 604 (D.D.C. 1981).

ment claim. *Palmer*, 815 F.2d at 90-101. Here, the only direct evidence contradicts such an intent—appellant's witness testified that the purpose of the CPP was to generate experienced Inspectors in MMAs. Although a showing of discriminatory effect may be evidence of intent (*Id.* at 90-91), appellees' statistical evidence, which considered the senior-first rule in isolation is, for the same reasons discussed earlier, legally insufficient to establish a claim of disparate treatment. *See* Part II(A), *supra*. Moreover, the District Court's heavy reliance on the effect of the senior-first rule and appellant's purported knowledge of that effect is also insufficient to sustain a finding of disparate treatment. Indeed, discriminatory intent implies more than simply an awareness of consequences. *See Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979). Rather, a conclusion that discrimination was intentional must be based on findings that the challenged action was taken *because of*, not just in spite of, its effect. *Id.* No such findings were made by the District Court in this case.

Second, the District Court committed fundamental legal error in requiring the Inspection Service to demonstrate a "valid need" for the directed transfer component of the CPP in order to rebut appellees' *prima facie* case. The employer's burden in a disparate treatment case is simply to articulate some legitimate nondiscriminatory reason for its actions. *Segar*, 738 F.2d at 1268-73. The employer is not required to prove that it was motivated by a nondiscriminatory reason, but simply to introduce evidence that would permit a rational conclusion that the employment decision had not been motivated by discriminatory animus. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 257 (1981).[31] The Inspection

[31] The burden of persuasion does not shift to the defendant, but remains at all times with the plaintiff. *Burdine*, 450 U.S. at 255-56. It is worthy of mention that the District Court had to amend its opinion in order to state that it intended a "production" rather

Service's explanation at trial of its need for experienced Inspectors in MMAs and its reasons for believing the Policy would meet that need, clearly satisfied this burden. *See* Part III(B), *supra*.

Third, in analyzing whether pretext had been shown and appellees' ultimate burden of proving intentional discrimination carried, the District Court correctly noted that to prevail, appellees had to show that "age made a difference in defendant's decision to transfer them in the sense that, but for defendant's discriminatory motive, plaintiffs would not have been transferred." 667 F. Supp. at 27. However, far from showing that appellee Inspectors would not have been transferred "but for" the Inspection Service's use of an allegedly discriminatory senior-first criterion, the unrebutted evidence established that under the CPP *all* eligible Level 23 Inspectors were required to serve a tour of duty in an MMA *and* were in fact transferred under the policy. Thus, regardless of the means employed to effect directed transfers, all Level 23 Inspectors would nonetheless have been transferred during the relevant time period.

Further, in analyzing the issue of intent, the District Court ignored undisputed evidence that the *oldest* Inspectors (those within five years of retirement, who were all over 45), were expressly exempt from directed transfers by the Policy itself. Although it is true that discrimination against one group of workers cannot be excused by favorable treatment of another group (*Teal*, *supra*), in the disparate treatment context, evidence of the employer's treatment of protected employees as a class is certainly relevant to a determination of whether there was intent to discriminate. *See Furnco Construction Corp.* 438 U.S. at 579-80; *Palmer*, 815 F.2d at 84. Accordingly, the District Court erred in limiting its consideration solely to the senior-first directed transfer component of the CPP

than a "persuasion" burden in this regard. *See* Order of August 20, 1987.

rather than examining the CPP as a whole in determining the issue of intent.[35]

Fourth, the District Court's speculation that the Policy was "unnecessary" to insure that experienced Inspectors served in major cities, or that a random selection method would have met this need just as well, was irrelevant and legally deficient.[36] As the Eleventh Circuit stated in the analogous Title VII context:

> Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules. "Title VII addresses *discrimination*." . . . Title VII is not a shield against harsh treatment at the work place. . . . Nor does the statute require the employer to have good cause for its decisions. The employer may . . . [take action respecting] an employee for a good reason, a bad reason, a reason based on erroneous facts, or no reason at all, as long as its action is not a discriminatory reason.

Nix v. *WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984) (citations omitted; emphasis in original), *see also Johnson* v. *Lehman*, 679 F.2d 918 (D.C. Cir. 1982).

Quite clearly, the District Court confused the order and elements of proof in a disparate impact claim with

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[35] By limiting its inquiry to the directed transfer component of the CPP, the District Court ironically succeeded in finding intentionally discriminatory transfers based upon facts which simply reflect the desire of many Inspectors to delay relocating for as long as possible. In other words, the Inspection Service's "animus" was apparently its decision to design a policy whereby individual Inspectors could delay, but not ultimately escape, the MMA tour of duty required of all Level 23 Inspectors. This is simply insufficient to demonstrate intentional age discrimination.

[36] Further, as discussed above, the evidence of record refutes the proposition that a random system would have been a viable alternative. *See* p. 43-45, *supra*.

the order and elements of proof in a disparate treatment case. By its emphasis on "valid needs" and "alternative procedures," the District Court held, in essence, that a finding of disparate impact necessarily impels a finding of disparate treatment. However, intent means doing something because of, not in spite of, a particular consequence. *See Personnel Administrator* v. *Feeney*, 442 U.S. at 279. Since the Inspection Service gave a "clear and reasonably specific" explanation (*see Burdine*, 450 U.S. at 268) for any statistical disparity and appellees offered no evidence to show that this explanation was pretextual, judgment should have been entered for appellant on the disparate treatment claims.

Finally, the District Court's conclusion that the senior-first rule violates the ADEA seems to contradict the very purpose of the statute. It is clear from the Congressional statement of findings and purpose set forth in the statute, as well as its legislative history, that the evil to which the ADEA was addressed was the assumption among employers that older workers were less capable than younger workers.[37]

The Career Path Policy, including the senior-first rule, is based upon exactly the opposite motivation: the Postal Service's desire to take better advantage of the skills of its more experienced (and thus older) Inspectors by assigning them to the areas with the most complex caseloads. The ADEA should not be interpreted to prohibit such a program, which seeks precisely "to promote employment of older workers based on their ability rather

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[37] Section 2(b) of the ADEA states that its purpose is "to promote employment of older persons based on their ability rather than age." 29 U.S.C. § 261(b). Senator Javits, one of the principal supporters of the Senate bill, explained the reason it was needed: "[T]here is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs." 113 Cong. Rec. 31253 (1967).

than age." 29 U.S.C. § 261(b). The District Court's holding to the contrary should therefore be reversed.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be reversed.

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No. 88-1770

Supreme Court, U.S.
FILED
1989
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1989

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether petitioner discriminated against older workers in violation of Section 4(a)(1) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(1), by (1) disqualifying laid-off workers who were eligible for retirement benefits from receiving severance or layoff benefits from 1979 until 1982, and (2) since 1982, forcing such workers to choose between severance or layoff benefits and early retirement benefits.

2. Whether petitioner's severance or layoff policies are sheltered from liability under Section 4(f)(2) of the ADEA, 29 U.S.C. 623(f)(2) – which allows an employer to observe the terms of a "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act – when petitioner has not shown that legitimate economic considerations justify its denial of severance or layoff benefits to laid-off workers who receive retirement benefits.

3. Whether the court of appeals erred when it vacated but did not reverse the district court's judgment that petitioner willfully violated the ADEA.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1770

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 869 F.2d 696. The opinion of the district court (Pet. App. 51a-102a) is reported at 632 F. Supp. 343.

JURISDICTION

The judgment of the court of appeals (Pet. App. 49a), as amended on rehearing (Pet. App. 47a-48a), was entered on February 2, 1989. The petition for a writ of certiorari was filed on May 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

From 1979 until 1982, petitioner paid severance or layoff benefits only to laid-off employees who were not

eligible for retirement (including early retirement) under the terms of its pension plan. In 1982, petitioner modified its employee benefit plans to provide that laid-off employees who were eligible to retire had the option of accepting either early retirement benefits or severance or layoff benefits.* Pet. App. 8a-9a, 11a-13a.

In 1983, the Equal Employment Opportunity Commission (EEOC) filed this action alleging that petitioner's policies violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The EEOC alleged (1) that petitioner's 1979 plan discriminated against older workers by denying severance or layoff pay to employees who were eligible to retire; and (2) that petitioner's 1982 plan discriminated on the basis of age by forcing employees who were eligible to retire to give up either severance or layoff pay or early retirement benefits. After a bench trial, the district court held that petitioner's treatment of retirement-eligible workers was willful age discrimination, and that it was not shielded by Section 4(f)(2) of the ADEA, which allows an employer to observe the terms of a "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act. Pet. App. 51a-102a.

The court of appeals affirmed the judgment of the district court that petitioner had violated the ADEA and was not protected by Section 4(f)(2). Pet. App. 1a-45a. Following the approach of the EEOC's regulations, the court held that "[i]n order to qualify as exempt from § 4(f)(2), a plan must involve age-related cost factors: *i.e.* the cost of providing benefits pursuant to the plan must increase with age." *Id.* at 27a. Because petitioner "neither

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* Employees who choose severance or layoff benefits receive their vested pension benefits at age 65.

provides actuarial proof nor even alleges that it costs more to provide older employees with the same severance benefits as younger employees" (*id.* at 28a), the court held that petitioner could not find shelter in the safe harbor of Section 4(f)(2). The court of appeals vacated the district court's judgment that the violation was willful, and remanded for reevaluation of that issue.

DISCUSSION

In *Public Employees Retirement System* v. *Betts*, No. 88-389 (June 23, 1989), slip op. 9-15, this Court rejected the EEOC's interpretation of Section 4(f)(2). Contrary to the EEOC's argument that "§ 4(f)(2) protects age-based distinctions in employee benefit plans only when justified by the increased cost of benefits for older workers" (slip op. 9), the Court held that "§ 4(f)(2) generally protects age-based reductions in fringe benefits" (slip op. 20). The Court interpreted Section 4(f)(2) as requiring that "when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." Slip op. 20.

The court of appeals did not consider whether petitioner's plans are shielded by Section 4(f)(2) under the test set forth in *Betts*. Rather, it analyzed petitioner's plans under the EEOC's regulations, which were invalidated by this Court. If petitioner is protected by Section 4(f)(2) as interpreted in *Betts*, then the other questions it raises in its petition for a writ of certiorari—whether it discriminated against older employees and, if so, whether it did so willfully—need not be reached. Accordingly, the decision below should be vacated and the case should be remanded

for the court of appeals to reconsider its decision in light of *Betts*.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded to that court for reconsideration in light of the decision in *Public Employees Retirement System* v. *Betts*, No. 88-389 (June 23, 1989).

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1770

WESTINGHOUSE ELECTRIC CORPORATION,*
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

The Solicitor General, in his Brief, has requested that the Court vacate the judgment of the Third Circuit, and remand this case for further consideration in light of this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989). For the reasons stated below, Westinghouse submits that the Court should grant the writ, summarily reverse the judgment against Westinghouse, and direct a dismissal of the case.

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* Pursuant to Supreme Court Rule 28.1, Westinghouse has listed its parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates in its Petition for a Writ of Certiorari previously filed with this Court.

DISCUSSION

The Third Circuit held below that Westinghouse violated section 4(a)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1), when it paid severance benefits only to laid off employees who were not eligible for, or who did not elect to receive, various forms of retirement benefits under its pension plans. The court further held that Westinghouse's severance and pension benefit plans were not protected by section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), because those plans were not "bona fide employee benefit plans" within the meaning of the ADEA. The basis for the court's latter finding was that Westinghouse's severance and pension benefit plans merely provided "fringe benefits" and did not involve age-related cost factors. Cert. App., at 25a-29a.

In its petition for a writ of certiorari, Westinghouse submitted that the Third Circuit's decision was erroneous for two reasons: (1) Westinghouse had not discriminated against employees because of age, and (2) even if it had done so, its plans were "bona fide employee benefit plans," and thus were exempt from coverage of the ADEA pursuant to section 4(f)(2). As the Solicitor General correctly recognizes in his Brief, the Court need not reach the first issue if it finds that Westinghouse's plans are protected by section 4(f)(2). The Solicitor General also correctly recognizes that the Court in *Betts* rejected the interpretation of section 4(f)(2) that the EEOC has advanced in this case.

The Court's decision in *Betts* is dispositive of Westinghouse's claim that its plans are bona fide employee benefit plans. The Court in *Betts*, expressly rejected the arguments that the EEOC raised in this case and that the Third Circuit relied upon, and held that "the phrase 'any bona fide employee benefit plan such as a retirement, pension, or insurance plan' cannot reasonably be limited to benefit plans in which all age-based reductions in bene-

fits are justified by age-related cost considerations." *Betts*, 109 S. Ct. at 2865. Rather, the Court held that "§ 4(f)(2) generally protects age-based reductions in fringe benefits." *Id.* at 2868. Similarly, the Court rejected the view that an employee benefit plan is a subterfuge if it is not justified by age-related cost considerations. *Id.* at 2864. Given the finding below that Westinghouse's plans provide "fringe benefits"—a finding that the EEOC has never contested—this Court can and should hold that Westinghouse's plans are protected by section 4(f)(2).

In a similar case, *Abenante v. Fulflex*, 701 F. Supp. 296 (D.R.I. 1988) in the United States Court of Appeals for the First Circuit, the EEOC, as plaintiff-intervenor, recognized that *Betts* is dispositive of the issues raised in the instant petition. In that case, the EEOC advanced the same interpretation of section 4(f)(2) as was the basis of the Third Circuit's decision in the present case. On August 3, 1989, in a letter to the First Circuit, the EEOC recognized that *Betts* "is dispositive of this case" because the holding in *Betts* "is contrary to or renders irrelevant the arguments made in [the EEOC's] opening brief." (The EEOC's letter is reprinted and attached hereto as Appendix A). *Betts* mandates the same disposition of this case.

There is no sound reason to remand this case to the court of appeals. The EEOC's sole argument with respect to Westinghouse's plans has been that they were not bona fide employee benefit plans; the EEOC has never contended that Westinghouse's plans were "subterfuges." Indeed, in answers to Westinghouse interrogatories, the EEOC stated that it "did not contend that the subject Plans and Agreements constitute a subterfuge to evade or avoid the purposes of the Age Discrimination in Employment Act." (Reprinted and attached hereto as Appendix B). As a consequence, the EEOC failed to present any evidence in the district court regarding the subter-

fuge issue and did not brief the issue in the court below. Thus, it is hardly surprising that the court below did not find subterfuge. There is, in short, no issue to consider on remand.

CONCLUSION

For the reasons stated above, Westinghouse requests that the Court summarily reverse the judgment of the Third Circuit and order dismissal of the case below.

Respectfully submitted,

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Dated: August 25, 1989

APPENDICES

APPENDIX A

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20507

August 3, 1989

[SEAL]

Office of
General Counsel

Francis P. Scigliano, Clerk
United States Court of Appeals
for the First Circuit
1606 John W. McCormack Post Office
and Courthouse
Boston, Massachusetts 02109

Re: *Abenante v. Fulflex, Inc.*, Nos. 89-1179, 89-1180

Dear Mr. Scigliano:

The Equal Employment Opportunity Commission, Plaintiff-Intervenor, Appellant, is filing this letter to inform the Court that the recent Supreme Court decision in *Public Employees Retirement System of Ohio v. Betts*, 57 U.S.L.W. 4931 (U.S. June 23, 1989) is dispositive of this case. In *Betts*, the Supreme Court, in the context of a disability retirement plan, concluded that the phrase "'any bona fide employee benefit plan such as a retirement, pension, or insurance plan'" in section 4(f)(2) of the Age Discrimination in Employment Act, 29 U.S.C. 623(f)(2), is not limited to those plans in which "all age-based reductions are justified by age-related cost considerations." 57 U.S.L.W. at 4935. The Court held that "§ 4(f)(2) . . . exempt[s] the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship.

. . ." *Id.* at 4936. This holding is contrary to or renders irrelevant the arguments made in our opening brief.

Specifically, the Commission argued that in reducing older employees' severance pay based on the present value of their pension benefits, defendant expressly discriminated against its older workers in violation of section 4(a)(1) of the ADEA. Br. at 9. The Commission argued that the reduction in severance pay was not immunized from liability by section 4(f)(2) because defendant's plan was not an employee benefit plan covered by section 4(f)(2), since the costs of separation pay did not increase with age. Br. at 27. The Commission argued further that, inasmuch as defendant had not shown a legitimate economic justification for the pension offset, defendant had failed to prove that the separation pay reduction was not a subterfuge to evade the ADEA's purposes, as required by section 4(f)(2). Br. at 36.

While, for the reasons stated in our main brief, the Commission continues to disagree with the district court's ruling on section 4(a)(1), *Betts*' interpretation of section 4(f)(2) renders the section 4(a)(1) issue moot. The Supreme Court rejected both of the Commission's section 4(f)(2) arguments: The Court concluded that the phrase " 'any bona fide employee benefit plan such as a retirement, pension or insurance plan' cannot reasonably be limited to benefit plans in which all age-based reductions in benefits are justified by age-related cost considerations." 57 U.S.L.W. at 4935. Likewise, the Court rejected the view that an employee benefit plan was a subterfuge to evade the ADEA's purposes if it was not justified by cost considerations. *Id.* at 4934. Consequently, *Betts* requires affirmance of the district court's ruling on the section 4(f)(2) issues in this case.

The Commission is filing this letter in lieu of a reply brief and believes that oral argument in this case is not necessary. Enclosed are copies of this letter for the Court. Copies have also been served on counsel of record.

Sincerly yours,
/s/ John F. Suhre

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APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-5457

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

—VS—

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant.

DEFENDANT'S FIRST SET OF
INTERROGATORIES TO PLAINTIFF

To: JAMES GARRETT, ESQ.
Trial Attorney
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Philadelphia District Office
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Attorneys for Plaintiff

COUNSEL:

Defendant Westinghouse Electric Corporation herewith serves upon you its First Set of Interrogatories in the above-entitled cause and demands answers thereto within the time provided by the Rules of Court.

* * * *

10. Does plaintiff contend that either the Westinghouse Pension Plan and/or the Pension and Insurance Agreement between Westinghouse Electric Corporation and the International Union of Electrical, Radio and Machine Workers, as in effect during the time period relevant to the instant action, constitute a subterfuge to evade or avoid the purposes of the Age Discrimination in Employment Act? If so, (a) specifically identify the portion or portions of the Plan and/or Agreement which are involved, (b) set forth specifically and in detail each and every fact upon which plaintiff relies to support its claim; and (c) identify each and every document relied upon to support this claim, listing its title, date, author, and custodian.

RESPONSE NO. 10:

Plaintiff does not contend that the subject Plans and Agreements constitute a subterfuge to evade or avoid the purposes of the Age Discrimination in Employment Act ("ADEA").

* * * *

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Response to Defendant's First Set of Interrogatories was served on counsel for Defendant by first class mail, postage prepaid, this 1st day of August, 1984, addressed as follows:

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OCTOBER TERM, 1988

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Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF MACHINERY AND ALLIED PRODUCTS INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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June 1, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Where an employer has long maintained a collectively bargained program of benefits for former employees, which treats older employees more favorably than younger employees, may a court dissect the total program into parts and hold that one part, isolated from the remainder, discriminates against older employees under § 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA").

2. Whether a plan that exists and pays benefits fails to qualify as a "bona fide employee benefit plan" within the meaning of § 4(f)(2) of the ADEA because it lacks age-related cost factors; this same question is now pending before the Court in *Public Employees Retirement System v. Betts*, No. 88-389.

3. Whether an employer whose conduct at the time was not contrary to the law as then pronounced and applied by other federal courts may be held in "willful" violation of the ADEA.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Westinghouse Electric Corporation v. Equal Employment Opportunity Commission (No.88-1170) 15,18,19

R. MacNabb, *Manufacturing Is Alive . . . and Changing*, Machinery and Allied Products Institute, pages 7 and 4 (employing U. S. Department of Commerce data) (April 1987) 7

President's Council of Economic Advisers, *Economic Indicators* (April 1989) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1770

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF MACHINERY AND ALLIED PRODUCTS INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Machinery and Allied Products Institute ("MAPI") respectfully submits this brief amicus curiae, pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

MAPI is a policy research institute with approximately 500 member companies including leading producers in heavy industry, electronics, precision instruments, telecommunications, computers, chemicals, oil and gas, aerospace,

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[1] Consents have been filed with the Clerk of the Court.

and other high-technology industries. MAPI acts in the public interest as an advocate for policies that stimulate productivity, growth, and innovation throughout the industrial sector, thereby enhancing U. S. competitiveness.

MAPI is aware that many companies, including a number of its members, have formulated comprehensive packages of retirement and severance benefits which enable employees to receive either immediate retirement benefits, severance and deferred retirement benefits, or some combination of the two with one sometimes reduced in consideration of the other. MAPI is concerned that the decision of the court below, prohibiting the integration of pension and severance benefits, will mandate the payment of unintended benefits under existing benefit plans. As a result, employers may be forced to reduce or even eliminate either severance or non-vested early retirement benefits.

The rule adopted by the court below is likely to have a significant impact on the level of benefits provided in the severance and pension plans of a significant number of MAPI member companies. In the near term, the decision will dramatically increase the cost of necessary restructuring efforts undertaken in response to economic change. In the long term, the decision is likely to increase the burden carried by displaced employees who will no longer enjoy voluntary severance programs which employers are likely to abandon in the wake of the Third Circuit's ruling. It is because of this potentially serious adverse effect on the performance of U. S. industry that MAPI has felt compelled to present its first brief as an amicus curiae.

MAPI believes that the present case provides the proper vehicle for the Court to recognize that the ADEA was not intended to deny employers and unions the flexibility to trade off severance and pension benefits in negotiating a coordinated package of post-employment benefits.

I. SUMMARY OF ARGUMENT

The Third Circuit's prohibition of the integration of pension and severance benefits mandates the payment of benefits not contemplated by existing plans. Because of the resulting significant increase in liability, employers may be discouraged from restructuring their businesses in order to remain competitive, or may be forced to reduce or eliminate future increases in pension benefits. At a time when Congress has expressed concern over the plight of workers who lose employment due to plant shut-downs, employers may find it necessary to reduce or eliminate future severance benefits that would otherwise ease the burden of future plant closings. In addition, by prohibiting employers and unions from effectively negotiating severance and pension plans, the Third Circuit's decision impairs and quite possibly precludes the ability of these parties to provide a benefits package most suitable to the particular entities they represent.

In addition, the decision below is inconsistent with statutes governing federal employees' benefits, with the rulings of other courts, and with this Court's determination that integrated benefits need not have a common purpose.

For the foregoing reasons, this Court should grant Petitioner's request for a Writ of Certiorari, and the judgment of the Third Circuit should be reviewed and reversed.

II. ARGUMENT

A. The Decision Below Mandates The Payment Of Benefits Not Contemplated By Existing Plans And Promises The Reduction Or Elimination Of Future Pension Benefit Increases Or The Reduction Or Elimination Of Future Severance Benefits

In *Alessi v. Raybestos, Manhattan*, 451 U.S. 504 (1981), this Court noted that approval of benefit integration was part of the legislative response to the inherent "tension

between the primary goal of benefitting employees and the subsidiary goal of containing pension costs." 451 U.S. at 515. The House Ways and Means Committee was aware:

> that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth or perhaps even eliminat[ing] private retirement plans.

Id.

Significantly, Congress was preoccupied with a very similar tension in crafting the ADEA. The primary goal of the ADEA was to promote employment opportunities for older workers. In order to achieve that goal, Congress knew it must avoid regulating benefits in a manner that increased the cost of employing older workers. The legislative history of the ADEA demonstrates its drafters' preoccupation with the need to make sure that in outlawing age discrimination the statute did not price older employees out of the market.[2]

The decision below dramatically disrupts the delicate balance of legislative goals underlying the ADEA. The practical effect of the Third Circuit's decision is to mandate preferential treatment of older employees at the expense of needed benefits for the larger population of displaced workers.

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[2] *Age Discrimination in Employment and Hearings on S.830 and S.788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, at 14, 29-30, 90th Cong., 1st Sess. (March 15-17, 1967).

1. Under the Decision Below, Employers Must Pay Both Pension And Severance Benefits To Employees Over Forty From Plans Not Designed To Support Double Benefits

If the decision below is allowed to stand, employers who establish severance programs for employees discharged for economic or business reasons and whose pension plans offer an early retirement option will be forced to pay both pension and severance benefits to employees over 40 years of age. Neither ERISA nor the ADEA compel the payment of such double benefits to employees who are discharged for economic reasons and who happen to be eligible for early retirement. Nor are employers who are forced by economic reasons to restructure and downsize their workforces in any position to meet these significant and unanticipated expenses which further dilute the resources available to restore the business to a viable state. To the contrary, the employers and unions which negotiated these plans did so with the specific intent that such double payments would not be made in order that the maximum number of employees would benefit. If employers are bound to provide a double level of benefits, the cost of those benefits may be so large as to encourage employers to reduce or eliminate future benefits, or as to vitiate any economic advantage that could be realized from a restructuring.

a. Employers Would Be Precluded From Negotiating Collective Bargaining Agreements With Their Unions That, In The Event Of A Layoff, Could Provide A Balanced Package Of Offsetting Severance And Early Retirement Benefits To The Largest Group Of Affected Employees Given A Particular Cost Structure

The decision below significantly impairs the ability of employers and unions to effectively negotiate severance and pension plans. The knowledge that these parties bring

to the bargaining table is invaluable; aware of the circumstances and needs surrounding their particular industry, the parties can trade off benefits in order to make available the most comprehensive benefit package under the circumstances to the broadest possible spectrum of employees. In the context of collective bargaining, severance agreements are developed by the parties most familiar with the needs and desires of the particular labor force in question and most interested in minimizing the burdens created by a plant closing or other restructuring. By eliminating the right of the parties to bargain with respect to the severance portion of the benefits package, the Third Circuit has precluded the parties from using their knowledge of the particular circumstances of the employees to provide the benefits package most suitable to that labor force. The decision of the Third Circuit, not compelled by the ADEA but based instead upon an overly expansive notion of an equitable balance between groups of employees, runs afoul of the fundamental jurisprudence of this Court that intervention into the substance of collective bargaining is to occur only in the most limited circumstances. *H.K. Porter v. NLRB*, 397 U.S. 90 (1970).

b. Employers Planning A Business Restructuring Will Incur A Substantial Expense For Benefits That Would Not Have Been Anticipated At The Time The Severance And Early Retirement Plans Were Instituted And That Will Discourage Restructuring Needed By Companies To Remain Competitive

The decision below will have a drastic effect on business decisions made by employers facing increased competition. Since the early 1970s, competition in both domestic and global markets for manufactured products and related services has increased significantly. The severity of this competition has forced most businesses to reallocate both capital and labor resources to those activities likely to increase the overall efficiency of operations. In particular,

the manufacturing sector has had to restructure both its capital base and employee configuration in order to regain its competitiveness. The cost for this restructuring has been enormous.[3] Yet, the relative growth in the economy—an average annual growth rate of 4.2 percent from 1982 through 1987, well above this nation's long-run growth rate of approximately three percent—and the substantial reduction of unemployment from its peak in 1983 of 10,717,000 to 6,701,000 in 1988 indicate that these wrenching efforts have borne fruit.[4] Businesses which have faced this decision generally have attempted to provide ample adjustment assistance to those employees affected adversely. To provide this adjustment assistance, businesses have had to finely allocate their resources so as to revive the economic viability of their enterprise as well as buffer the impact on employees. The decision of the Third Circuit shatters this balance by causing an unanticipated cost to employers not required by law by reallocating moneys between employees eligible for early retirement and employees who are ineligible for early retirement.

The significant increase in costs which would be incurred in making severance payments due to the Third Circuit's decision may well discourage companies from proceeding with restructurings in the future. Such companies may be forced to retain their investment of capital and labor in uneconomic facilities rather than to reallocate those re-

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[3] For example, the percent distribution of constant (1982) dollar value added of the primary metal industries fell from 11.2 percent in 1960 to 4.4 percent in 1985, while that for machinery, except electrical (including data processing equipment), increased from 10.1 percent to 17.3 percent over the same period. Similarly, the percentage of employment accounted for by manufacturing dropped from 31.0 percent in 1960 to 19.8 percent in 1985. R. MacNabb, *Manufacturing Is Alive . . . and Changing*, Machinery and Allied Products Institute, pages 7 and 4 (employing U. S. Department of Commerce data) (April 1987).

[4] President's Council of Economic Advisers, *Economic Indicators* (April 1989).

sources to more productive investments, with the result that such companies would have difficulty remaining competitive. As a company's ability to compete is lost, its overall employment levels are likely to decline substantially. Thus, by engaging in legal micromanaging of employee benefits, the Third Circuit ignores the realities of the competitive challenges facing industry, thereby threatening the ability of many businesses to remain competitive.

2. Contrary To The Intent Of Congress, The Decision Below Creates Major Incentives To Reduce Or Eliminate Future Pension Benefit Increases Or Reduce Or Eliminate All Discretionary Severance Payments That Would Otherwise Ease The Burden Of Future Plan Closings

As mentioned by the district court in *Vintilla v. United States Steel Corp. Plan for Employee Pension Benefits*, 606 F.Supp. 640 (W.D. Pa. 1985), *aff'd*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 475 U.S. 1141 (1986), integration provides a "practical method of extending fund resources while maintaining a consistent or increasing level of payments among recipients;" "the more outside income available to plan beneficiaries, the more pension money may be saved by setoff, within limits. The savings would permit the fund to pay a higher average pension." 606 F. Supp. at 643. Therefore, the level of immediate retirement benefits provided to older employees under existing collective bargaining agreements was made possible by the discount of the severance payment offset. Should the Third Circuit's decision stand, employers will not be able to maintain such a high level of pension benefit in the future. Employers may be encouraged to forego an increase in pension benefits, or to increase the requirements necessary in the future for employees to become eligible for immediate retirement benefits.

Of even more concern, the Third Circuit's decision strongly encourages employers to reduce the amount of

severance payments which such employers have voluntarily provided for their employees. In fact, the decision by the court below creates an incentive for employers to eliminate entirely such discretionary severance payments which would otherwise ease the burden on employees of future plant closings. By discouraging these payments, the decision below runs completely contrary to the intent of Congress. Under the Worker Adjustment and Retraining Notification Act of 1988 ("WARN"), 29 U.S.C.A. §§ 2101 *et seq.* employers with more than 100 full-time employees are required to give 60 days' advance notice of certain plant closings or "mass layoffs." 29 U.S.C.A. § 2102 (Supp. 1989). An employer who fails to give the requisite notice is generally liable for monetary damages to the affected employees; however, under Section 5(a)(2)(B) of WARN, the employer's liability is reduced by any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation.[5] Thus, WARN allows voluntary severance payments to be an opportunity to reduce an employer's liability for failure to give the proper notice, and thus encourages voluntary payments to employees. Here again, the Congress has reiterated its policy of encouraging the provision of voluntary severance plans.

The Third Circuit's analysis was conducted with blinders on, focusing on a narrow point in the full mosaic of employee benefits and protections rather than comprehending the full scope and interactive nature of our economic system and imperatives including employee benefits. These policy issues create a compelling reason for the petition to be granted and the decision below reversed.

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[5] 29 U.S.C.A. § 2104(a)(2)(B) (Supp. 1989).

B. The Decision Below Ought To Be Reviewed Because, Contrary To The Will Of Congress, It Prohibits The Integration Of Employee Benefits Based On An Arbitrary View Of Their Purposes

1. Congress Has Enacted Legislation Expressly Authorizing The Integration Of Pension Benefits And A Variety Of Other Benefits, Including Severance Benefits

In the ADEA, Congress did not speak directly to the propriety of integrating retirement benefits and non-retirement benefits, such as severance benefits. But Congress repeatedly has enacted legislation which has addressed the issue head-on. These statutes make it very clear that, for decades, Congress has approved the practice of reducing or eliminating benefits—such as severance benefits—for employees entitled to an immediate retirement benefit. Had the issue been addressed in the ADEA, there should be no doubt that Congress would have approved the very same benefit integration it had already mandated for federal employees and military personnel. To believe otherwise would require the conclusion that Congress has itself structured benefit plans violating the intent of the ADEA ever since 1974 when federal employees and military personnel were brought within the coverage of the Act. *See* 29 U.S.C.A. § 633a(a) (1985).

a. Federal Law Expressly Excludes From Eligibility For Severance Pay Federal Employees Eligible For An Immediate Retirement Benefit

In 1967, Congress enacted a severance pay plan for most federal employees employed for at least twelve months and separated from service involuntarily. 5 U.S.C.A. § 5595 (1980). However, Congress specifically excluded from eligibility for severance benefits:

> an employee who . . ., at the time of separation from the service, has fulfilled the requirements

> for immediate annuity under [any applicable retirement system].

5 U.S.C.A. § 5595(a)(2)(B)(iv) (1980). Like most private retirement plans, the Civil Service Retirement Act grants an immediate retirement annuity to employees of a certain age who have completed a certain number of years of service. 5 U.S.C.A. § 8336 (1980). For example, a federal employee separated involuntarily is entitled to an immediate annuity if he has completed 25 years of service, or only 20 years of service if he is 50 or more years of age. 5 U.S.C.A. § 8336(d) (Supp. 1989).

Thus, Congress has created a severance benefit system for federal employees which expressly conditions the payment of severance benefits on ineligibility for age-based retirement benefits—the very same benefit integration written into Petitioner's early severance and pension plans. Under the reasoning of the court below, the federal government violates the spirit of the ADEA each and every time it denies severance benefits to displaced older employees who are pension eligible.

b. Federal Statutes Expressly Reduce Or Eliminate Severance Pay For Military And Related Personnel Eligible For Immediate Retirement Benefits

Just as with federal employees, Congress has enacted a series of laws which reduce or deny severance benefits for military personnel who are eligible for an immediate retirement benefit upon separation from their service.

In 1963, Congress provided statutory severance benefits for Coast Guard officers who are discharged or separated from service under a variety of authorities. However, in each case Congress required trade-offs between retirement and severance benefits. Certain discharged officers are entitled to a lump-sum severance payment, but Congress required that the officers' retirement benefits be reduced in

consideration of the lump-sum payment.[6] In other cases, severance pay is provided only if the officer is *in*eligible for voluntary retirement. 14 U.S.C.A. § 327(b) (Supp. 1989).

In 1980, Congress again integrated severance and pension benefits in legislation providing severance pay for military personnel upon involuntary discharge or release from active duty. 10 U.S.C.A. § 1174 (1983). The statute specifically denies severance pay to a member of the armed forces who "upon discharge or release from active duty is immediately eligible for retired or retainer pay based on his military service." 10 U.S.C.A. § 1174(e) (1983). The same legislation grants separation pay to an officer removed from active duty, but only if such officer is *in*eligible for voluntary retirement on the date of such removal. If eligible for voluntary retirement, the officer receives retired pay but no separation pay. 10 U.S.C.A. § 1186(b) and (c) (1983). The same legislation also provided severance pay for certain Coast Guard officers, but with a setoff provision which reduces retirement payments in consideration of severance payments.[7]

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[6] The statute provides:

> The acceptance of a lump-sum payment under this section does not deprive a person of any retirement benefits from the United States. *However, there shall be deducted from each of his retirement payments so much thereof as is based on the service for which he has received payment under this section until the total amount deducted equals the amount of the lump-sum payments.*

14 U.S.C.A. § 286(b) (Supp. 1989) (emphasis added).

[7] The statutes provides:

> The acceptance of severance pay under this section does not deprive a person of any retirement benefits from the United States. However, there shall be deducted from each of the retirement payments so much thereof as is based on the service for which he has received severance pay under this section, until the total deductions equal the amount of

In the 1984 amendments to the Coast and Geodetic Survey Commissioned Officers Act of 1948, Congress once again specifically prohibited payment of the full amount of both retirement *and* separation benefits.[8]

c. The Employee Retirement Income Security Act Of 1974 Expressly Recognizes The Practice Of Reducing Pension Benefits In Consideration Of "Social Security Benefits And All Other Relevant Factors"

In 1974—seven years after enactment of the ADEA—Congress passed ERISA. Unlike the ADEA, ERISA focused exclusively on employee benefit plans, both retirement plans and non-retirement welfare plans. This Court has described ERISA as a "comprehensive and reticulated statute" produced by an exhaustive study of methods for improving the administration of the nation's private pension plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). One product of this exhaustive study was the conclusion that benefits received from sources other than a pension plan *may* be taken into account to reduce the amount of a defined pension benefit.

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such severance pay. However, no person is entitled to severance pay under this section in an amount that is more than $15,000.

14 U.S.C.A. § 286a(d) (Supp. 1989).

[8] The statute provides:

> An officer who has received separation pay under this section, or . . . severance pay . . . under any other provision of law . . . and who later qualifies for retired pay under this Act shall have deducted from each payment of retired pay so much of that pay as is based on the service for which the officer received that separation pay . . . until the total amount deducted is equal to the total amount of separation pay . . . received.

33 U.S.C.A. §853h(e)(1) (1986).

ERISA establishes certain benefit accrual requirements for all pension plans. 29 U.S.C.A. § 1054 (Supp. 1989). With respect to defined benefit plans, the Act imposes certain limits on methods for calculating the benefit to which an employee is due, including certain minimum levels of benefits. Repeatedly, Congress punctuated these plan requirements with the following provision:

> For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

29 U.S.C.A. §§ 1054(b)(1)(A)(ii); 1054(b)(1)(B)(iv); and 1054(b)(1)(C) (Supp. 1989).

Clearly, Congress intended to permit pension benefits to be reduced not only in consideration of social security benefits but in consideration of "all other relevant factors," meaning other sources of income with a value to "be treated as remaining constant. . . ." Congress was well aware that some of these sources, such as social security benefits, would only be available to older workers. Moreover, "Congress was well aware that pooling of nonpension retirement benefits and pension funds would limit the total income maintenance payments received by individual employees and reduce the cost of pension plans to employers." *Alessi v. Raybestos-Manhattan, Inc.*, *supra*, at 514-15. Congress not only permitted benefit integration but recognized that, by reducing plan costs, integration would promote important legislative goals of plan solvency and growth.[9]

In short, on repeated occasions both before and after enactment of the ADEA, Congress has deliberately re-

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[9] H.R. Rep. No. 807, 93rd Cong., 2d Sess. 69 (1974), *reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974* at 3189 (1976).

duced or eliminated benefits otherwise due based on an employee's eligibility for other sources of post-employment income available, in part, because the employee had reached a certain age. The decision below would have the effect of judging each of these benefit plans as constituting unlawful age discrimination, despite the fact that they were authored by the same hand that outlawed age discrimination in the ADEA. The decision below requires the conclusion "that Congress itself has repeatedly flaunted its own declaration of policy." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 90 (1973). This Court has warned that it will not "lightly find such a breach of faith." *Id.* at 90-91.

The foregoing record of federal legislation is compelling evidence that the decision below misinterprets the ADEA and squarely contradicts the intent of Congress.

2. In *Alessi v. Raybestos-Manhattan, Inc.*, This Court Unanimously Endorsed The Integration Of Retirement Benefits and Non-Retirement Benefits

The decision below insists that pension benefits and severance benefits—like apples and oranges—are so fundamentally different in nature that substituting one for the other cannot be permitted. The Third Circuit wrote:

> Under [Petitioner's] plans, severance pay and pension benefits have distinctly different purposes. Severance pay was a short term fringe benefit to provide financial assistance during the adjustment period immediately following layoff; pension benefits were long-term retirement benefits. The district court concluded that pension benefits are not a substitute for severance pay. We agree.[10]

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[10] See Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit, Appendix at 20a (hereinafter "Pet. App. at ____ ").

In *Alessi*, *supra*, this Court did not agree. Instead, it held that pension and non-pension benefits may be integrated. Indeed, this Court specifically rejected the contention that benefits may be integrated only if they share a common purpose.

In *Alessi*, two pension plans provided that an employee's retirement benefits would be reduced, or offset, by the amount of all workers' compensation awards for which the employee was eligible. Retired employees argued, in part, that Congress intended to limit setoffs only to situations in which one long-term retirement benefit was substituted for another. Every participating Justice of this Court disagreed.[11]

> [R]etirees claim that workers' compensation provides payments for work-related injuries, while Social Security and Railroad Retirement supply payments solely for wages lost due to retirement. Because of this distinction, retirees conclude that integration of pension funds with workers' compensation awards lacks the rationale behind integration of pension funds with Social Security and Railroad Retirement. Retirees' claim presumes that ERISA permits integration with Social Security or Railroad Retirement only where there is an identity between the purposes of pension payments and the purposes of the other integrated benefits. *But not even the funds that the Congress clearly has approved for integration purposes share the identity of purpose ascribed to them by petitioners.* Both the Social Security and Railroad Retirement Acts provide payments for disability as well as the wages lost due to retirement, and ERISA permits pension integration without distinguishing these different kinds of benefits.

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[11] Justice Brennan took no part in the decision of *Alessi*.

Id. at 518-19 (emphasis added).

Thus, there is no basis in law or policy to conclude that severance and retirement benefits may not be integrated because of their different purposes. The misguided analysis that led to this conclusion by the court below should be reviewed by this Court.

3. The Third Circuit Ignored Important Factors Relied Upon By Other Courts In Judging Whether Benefits Are Part Of A Lawful, Integrated Plan

The decision below relied on an arbitrary, meaningless distinction between the purposes of severance and retirement benefits in reaching the erroneous conclusion that these categories of benefits may not be integrated as a matter of law. In doing so, the Third Circuit failed to credit important characteristics of benefit plans which ought to guide a judgment about whether they are properly integrated.

Courts have paid particular attention to whether an employer and its unions have negotiated the integrated benefits concurrently and, therefore, have viewed them as comprising a single economic bargaining package.[12] Reliance on this factor is consistent with an important federal policy underlying the law of employee benefits: Congress does not mandate the outcome of benefit negotiations but simply sets the bounds within which those negotiations must occur.

A critical error of the decision below is its failure to credit the fact that Petitioner's pension and severance plans were the product of good-faith, contemporaneous bargaining between Petitioner and its unions on all elements of a benefits package. Severance and pension ben-

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[12] *See, e.g. EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. Great Atlantic and Pacific Tea Co.*, 618 F. Supp. 115 (D.C. Ohio 1985).

efits were traded off in the collective bargaining process. Clearly, Petitioner and its unions sought to provide income continuation for a broad group of displaced employees while holding the cost of that program to manageable, though steadily increasing, levels. Petitioner's pension and severance agreements were produced by the parties most familiar with the needs of Petitioner's labor force and most interested in minimizing the burdens created by a plant closing or other restructuring. In this context, the package of benefits enjoyed by Petitioner's employees cannot be viewed—in fact or in law—as anything other than a single, integrated whole.

Another factor properly considered is the length of time the benefits have been in existence. In *EEOC v. Firestone Tire & Rubber Co.*, 650 F.Supp. 1561 (W.D. Tenn. 1987), the court found that pension and severance benefits were properly integrated because, *inter alia*, the severance benefits had been part of the pension plan for over thirty years. It is most reasonable to believe that when benefit issues have shared space on a bargaining table for such an extended period, the resulting benefit package reflects the genuine integration of competing interests.

The court below appeared unmindful of the lengthy, complex course of bargaining which preceded Petitioner's current benefit plans—bargaining which predated the ADEA by many years. The retirement and severance elements of a benefits package evolved during decades of negotiation certainly are "integral components of a comprehensive employee benefits scheme." Pet. App. at 26a. The Third Circuit's conclusion that pension benefits cannot, as a matter of law, substitute for severance pay is simply wrong.

The fact is that Petitioner's older employees never were entitled to severance pay "in addition to, not a part of" an integrated benefits package in which severance benefits were conditioned, in part, on the employee's retirement

status. Pet. App. at 17a. In reality, neither the pension nor severance portions of the benefits package "pre-existed" the other because they were negotiated simultaneously. Older employees were not deprived of any entitlement—rather, their representatives negotiated with Petitioner and obtained certain entitlements, but not others. That negotiated benefits packages contain limited entitlements is an economic fact of life, not the basis for legal liability.

Congress never intended the ADEA to require unexpected payments of millions of dollars of benefits to older employees based on the faulty notion that pension and severance benefits may never be set off against one another.

III. CONCLUSION

The decision below inexcusably interferes with the good-faith collective bargaining process and the well-tailored integrated benefits packages which that process often produces. The decision handcuffs employers from rationally allocating limited resources to maximize economic viability and preserve the greatest number of jobs on a long-term basis. In doing so, the decision threatens the maintenance of pension benefits at their current level, the existence of voluntary severance benefits, and the competitiveness of many businesses. In addition, the decision represents judicial policymaking neither compelled by the ADEA nor consistent with Congressional action or intent. For all of the foregoing reasons, this Court should grant Petitioner's

request for a Writ of Certiorari and the judgment of the Third Circuit should be reviewed and reversed.

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IN THE
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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN MEAT INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Where an employer has long maintained a collectively bargained program of benefits for former employees, which treats older employees more favorably than younger employees, may a court dissect the total program into parts and hold that one part, isolated from the remainder, discriminates against older employees under section 4(a)(1) of the Age Discrimination in Employment Act of 1967 (ADEA).

2. Whether a plan that exists and pays benefits fails to qualify as a "bona fide employee benefit plan" within the meaning of section 4(f)(2) of the ADEA, because it lacks age-related cost factors; this same question is now pending before the Court in *Public Employees Retirement System v. Betts*, No. 88-389.

3. Whether an employer whose conduct at the time was not contrary to the law as then pronounced and applied by other federal courts may be held in "willful" violation of the ADEA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1770

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN MEAT INSTITUTE IN SUPPORT OF PETITIONER

The American Meat Institute (AMI), with the written consent of all parties,[1] respectfully submits this brief as Amicus Curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

INTEREST OF AMICUS CURIAE

AMI is a nonprofit corporation organized to promote the interests of the meat packing and processing industry and to assist it in operating responsibly, efficiently, and

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[1] The written consents of the parties have been filed with the Clerk of the Court.

profitably in the legislative, regulatory, and consumer environments. AMI's membership includes more than 420 companies which prepare and process the full range of meat and meat-food products available in the United States. AMI member companies produce over eighty percent of the federally inspected meat products available to American consumers and employ approximately 129,000 people in their operations. Many of these employees are protected by post-employment benefit plans which have been collectively bargained between AMI member companies and representative unions.

Substantially all AMI member companies are subject to the provisions of the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986) and Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. IV 1986). As such, AMI members are subject to uncertainty and confusion caused by the judgment of the United States Court of Appeals for the Third Circuit in *EEOC v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir. 1989), and therefore submit this brief Amicus Curiae in support of the petition for a writ of certiorari.

STATEMENT OF THE CASE

In 1983, the Equal Employment Opportunity Commission (EEOC) filed this action alleging that an employee benefits program, crafted through many years of collective bargaining between Westinghouse and employee-representative unions, which provided post-employment income protection to employees in the form of severance benefits or pension benefits, but not both, constituted willful age discrimination in violation of the ADEA. The district court found that because pension-eligible employees were ineligible for a second post-employment income stream—severance pay—the benefit plan constituted willful age-based discrimination. *EEOC v. Westinghouse Elec. Corp.*, 632 F. Supp. 343 (E.D. Pa. 1986).

On review, the Third Circuit held, as a matter of law, that "severance pay and pension benefits have distinctly different purposes," and that one may not be substituted for the other. 869 F.2d at 707. Ignoring the fact that Westinghouse's collective bargaining agreements had linked severance benefits and pension benefits since severance benefits were first negotiated in 1960, the court excised the severance provisions from the whole of the challenged benefit plan. Scrutinizing the severance benefit component of the plan alone, the court found a violation of the ADEA because the eligibility criteria for severance pay—ineligibility for pension benefits—was "inexorably linked with age." *Id.* at 706.

The court also ruled that the Westinghouse post-employment benefit plan was not an "employee benefit plan" under section 4(f)(2) of the ADEA. In this connection, it concluded that the severance provisions standing alone were short-term fringe benefits which were not contemplated by the section 4(f)(2) exemption, nor were they "integral components of a comprehensive employee benefits scheme." *Id.* at 710. To constitute an employee benefit plan under section 4(f)(2), the court held that the plan must "involve age-related cost factors." *Id.*

REASONS FOR GRANTING THE WRIT

I. THROUGH AN OVERLY BROAD INTERPRETATION OF THE PROHIBITIONS OF THE ADEA THAT CONFLICTS WITH CONGRESSIONAL INTENT AND THE DECISIONS OF OTHER CIRCUIT COURTS, THE THIRD CIRCUIT'S DECISION WILL IMPEDE EMPLOYERS' ABILITY TO DEVELOP COMPENSATION AND BENEFIT PACKAGES, ESPECIALLY THOSE THAT ARE COLLECTIVELY BARGAINED, THAT UNIQUELY AND FAIRLY MEET THEIR EMPLOYEES' NEEDS.

Like Westinghouse, many employers in the nation's meat packing and processing industry offer post-employment income protection to employees. These benefit plans

are, in many cases, the product of collective bargaining. Commonly, pension and severance benefits are negotiated as integral components of a comprehensive benefits plan. The Third Circuit's decision in this case of nationwide scope disrupts that process in a manner not intended by Congress nor sanctioned by other circuits. In addition to subjecting employers and unions to a rigid new rule which is not consonant with the ADEA, the Third Circuit's decision will disrupt the collective bargaining process and ultimately undermine the purposes of the ADEA. If the decision stands, it will force employers to seriously consider eliminating severance benefit programs or restricting the eligibility for or monetary contributions to pension programs.

A. The Third Circuit's Overly Broad Interpretation Of The ADEA's Prohibitions, In Violation Of Congress' Intent, Will Subject To Legal Challenge Innumerable Equitably Conceived And Administered Severance And Pension Plans.

The court below ignored congressional intent in adopting a rigid and formalistic rule which led to a finding that Westinghouse's post-employment policies concerning severance and pension benefits, as they existed in 1979 and as modified in 1982, were impermissible under the ADEA. In enacting the ADEA, Congress sought to avoid such a mechanical application of its proscriptions. It encouraged flexible application of the Act, taking into account the unique circumstances of each case.[2] The court below, however, adopted an inflexible approach that would find age discrimination in the design of most post-employment benefit plans.

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[2] *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 n.4 (6th Cir. 1975) (citing H.R. Rep. No. 805, 90th Cong., 1st Sess. 6-7, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213, 2219-20).

The ADEA was clearly intended to prohibit "arbitrary age discrimination." [3] It was not, however, formulated so as to hold employers liable for the mere presence of age, which might be an indirect and harmless part of the structure of a benefit plan.[4] The statutory scheme of the ADEA reflects this intent. Section 4(f)(1) permits otherwise prohibited discrimination where the differentiation is based on reasonable factors other than age. *Patterson v. Independent School Dist. #709*, 742 F.2d 465, 466 n.1 (8th Cir. 1984). Moreover, section 4(f)(2) protects bona fide employee benefit plans which contain a differentiation in benefits based upon age. 29 U.S.C. § 623(f)(2).

Patterson is instructive through its acknowledgment that the ADEA accommodates some differences based on age and that actuarial considerations are essential in evaluating the fairness of employee pension and benefit plans.[5] The court in *Patterson* stated:

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[3] 29 U.S.C. § 621(b); *Hearings on Employment Problems of Older Workers on H.R. 10634 and Similar Bills*, Select Subcomm. on Labor of House Comm. on Educ. and Labor, 89th Cong., 1st Sess. (Aug. 25, 31, Sept. 1, 2, 1965) (Statement of Secretary of Labor Wirtz).

[4] It is important to recognize that age, unlike race, sex, and other immutable factors protected under Title VII of the Civil Rights Act, is a universal characteristic that can be a benign component of employment policies or practices. For a discussion on this point, see the Secretary of Labor's Report to Congress which became the basis of the ADEA's enactment. U.S. Dep't of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964, at 2, 5-6 (1965); *see also Laugesen*, 510 F.2d at 313 n.4; *Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299, 1206 (E.D. Mich. 1976).

[5] Further evidence of the ADEA's flexibility in accepting age-based differences where it furthers a reasonable objective is found in the EEOC's Age Discrimination in Employment Act Interpretation on Apprenticeship Programs. 29 C.F.R. 1625.13 (1988). In its guidelines, EEOC concludes that the ADEA does not prohibit limiting entry into apprenticeship programs to youths below a certain age.

> Perhaps a plan (since the purpose of the [4(f)(2)] exemption is to afford practicality and flexibility in applying the prohibition against age discrimination) must be a systematic and interrelated structure where consideration of age is an actuarial necessity in order to attain fairness in computing benefits.

742 F.2d at 467. The court further recognized, quoting Justice White in his concurrence with this Court's decision in *United Air Lines v. McMann*, 434 U.S. 192, 207 (1977), that "all retirement plans necessarily make distinctions based on age." *Patterson*, 742 F.2d at 467.

By breaking Westinghouse's integrated severance and benefit plan into its component parts, finding fault in the slightest perceived variations in entitlements thereunder, and rejecting legitimate actuarial explanations of the plan's provision of benefits, the court below adopted a rigid rule which is not supported by the ADEA and is contrary to clear congressional intent. The decision below did not find arbitrary discrimination—it found a difference in benefits for which it rejected a legitimate explanation permissible under the ADEA. If the Third Circuit's approach is not rejected, the severance and benefit plans of innumerable employers throughout the United States will be subject to legal challenge regardless of the legitimate business or actuarial reasons supporting them.[6]

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[6] In addition, the courts of this country will be put into the position of passing judgment on the innumerable, varied, and complex pension and benefit plans which are predicated upon actuarial considerations. Surely, Congress did not envision the courts dissecting the nation's compensation and benefit plans in search of minute and inconsequential disparities. *Cf. Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. (BNA) 906, 909 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

B. By Discouraging The Provision By Employers Of Severance And Other Post-Employment Compensation, The Third Circuit's Decision Will Undermine The Purposes Of The ADEA.

Congress' primary purpose in enacting the ADEA was to eliminate discrimination in the hiring of older workers. *Alford v. City of Lubbock*, 664 F.2d 1263, 1270 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982). Congress expressed particular concern about the unemployment of older workers[7] and especially their ability "to regain employment when displaced from jobs."[8] Contrary to this purpose, however, the overly broad view of the prohibitions of the ADEA taken by the Third Circuit below will discourage the provision of post-termination income and have its most harmful impact upon those likely to experience greater difficulty re-entering the job market and thereby defeat a major purpose for the enactment of the ADEA.

In providing an exemption from the prohibitions of the ADEA for employers who observe the terms of bona fide employee benefit plans, Congress attempted to facilitate the hiring of older workers, rather than deter it, by making it possible for them to be employed without disrupting existing benefit plans.[9] Through its dissection of Westinghouse's collectively bargained severance and retirement benefit plan and conclusion that it violated the ADEA, however, the decision below will discourage the voluntary inclusion of severance pay as part of company

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[7] The use of the term "older employees" herein refers to those age 40 and above protected under the ADEA. 29 U.S.C. § 631(a).

[8] Congressional Statement of Findings and Purpose, 29 U.S.C. § 621(a)(1).

[9] Senator Javits, a primary sponsor of the ADEA, expressed this point on introducing an amendment that became section 4(f)(2) of the ADEA. *Hearings on S. 830 and S. 788*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 27-28 (1967).

benefit packages and collective bargaining agreements.[10] This undesirable result will prove detrimental to all employees who would otherwise benefit from the financial safety net provided by severance pay while they seek new employment. It will be especially harmful to those older employees laid off or terminated after being employed an insufficient period of time to qualify for early or normal retirement income. As noted above, it is this group Congress was particularly interested in protecting when it enacted the ADEA because of the difficulty older workers often experience in finding new jobs. Thus, the position taken by the EEOC and adopted by the court below is inconsistent with and counterproductive to Congress' purpose in enacting the ADEA.

C. Because It Conflicts With The Rulings Of Other Federal Courts Concerning The Propriety Of Post-Employment Benefit Plans Under The ADEA, The Third Circuit's Decision Will Cause Uncertainty And Instability In The Administration Of Such Plans Throughout The United States.

By arbitrarily dividing Westinghouse's plan into component parts, the Third Circuit improperly isolated age as the factor which determined ineligibility for severance benefits. The court's analysis gave little consideration to the nondiscriminatory reason—entitlement to actuarially equal or greater post-employment pension benefits—which determined ineligibility for severance benefits. In effect, it held that such legitimate business reasons cannot constitute reasonable factors other than age. In so ruling, the Court's decision has the practical effect of striking the section 4(f)(1) "reasonable factor other than age" defense from the ADEA in the post-employment benefit

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[10] *EEOC v. USX Corp.*, No. 87-6044 at 23 (E.D. Pa. Mar. 23, 1989) (LEXIS, Genfed library, Dist file).

plan context.[11] Moreover, the Third Circuit rejected Westinghouse's ADEA section 4(f)(2) defense by holding that, as a matter of law, severance and pension benefits cannot constitute integral parts of a single post-employment income protection plan.[12]

Consequently, the decision below is in conflict with the decisions of other circuits.[13] Other federal courts recognize that an employee's entitlement to other post-employment benefits is an eligibility condition which equalizes, rather than discriminates. *See, e.g., Parker*, 741 F.2d 975; *Britt*, 768 F.2d 593. As such, entitlement to other benefits is a reasonable factor other than age. The Third Circuit decision, however, removes from consideration the pension components of an otherwise integrated benefits package, thus depriving an employer of an opportunity to show that ineligibility for severance pay is based upon a rea-

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[11] Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), protects any action by an employer "where the differentiation is based on reasonable factors other than age . . . ."

[12] Although the decision represents the law of the Third Circuit, even the district courts in that circuit have expressed concern about following an arbitrary rule of law. *E.g., EEOC v. USX Corp.*, No. 87-6044 at 18 (E.D. Pa. Mar. 23, 1989) (LEXIS, Genfed library Dist file) ("[w]ere this a matter of first impression, I would agree . . . [under] the terms of the pension plan that the severance pay offset [pursuant to which pension payments were reduced to the extent of severance payments received] does not discriminate on the basis of age.")

[13] The Seventh Circuit for example, has upheld the propriety under the ADEA of the denial of severance benefits to a former employee who chose to be retired rather than laid off. *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (7th Cir. 1984). Likewise, the Fourth Circuit has held that "no discrimination within the contemplation of the ADEA resulted" under an integrated plan which linked eligibility for severance benefits with acceptance of deferral of pension benefits. *Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593, 594 (4th Cir. 1985).

sonable factor other than age—entitlement to an equal or greater pension benefit.[14]

Because the decision below conflicts with the holdings of other federal courts, the numerous employers located throughout the United States represented by Amicus are now subject to inconsistent standards with respect to the propriety of post-employment benefit plans under the ADEA. The decision below has caused great uncertainty concerning whether, in reviewing a collectively-bargained pension and severance plan, a court will sanction the existence of reasonable factors other than age, such as an employee's eligibility for post-employment income, or simply ignore this factor and apply the Third Circuit standard. If a court follows the approach of the Seventh and Fourth Circuits, integrated pension and severance benefits plans will survive ADEA challenge. If, however, a court follows the Third Circuit's approach the severance benefit component of the plan will be viewed in isolation, with a likely finding of age-based discrimination.

D. The Third Circuit's Decision Not Only Impedes Compliance With The ADEA Through Its Conflict With Rulings Of Other Courts, But Also Creates Further Confusion By Interpreting Section 4(f)(1) Inconsistently With Parallel Provisions Of The Equal Pay Act And Title VII.

In rejecting Westinghouse's collectively bargained benefit plan, the Third Circuit reached an inexplicable result. It concluded that older employees treated more favorably than younger employees were victims of discrimination. The court reached this ironic result by rejecting Westinghouse's defenses raised under sections 4(f)(1) (reasonable factors other than age) and 4(f)

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[14] Indeed, the Third Circuit itself recognized that under the Westinghouse plan employees who received pension benefits fared better than employees who received severance pay. 869 F.2d at 705.

(2) (bona fide employee benefit plan) and finding the ADEA is violated regardless of whether employees are adversely affected or subject to arbitrary discrimination. Instead, the court below focused on any difference in treatment regardless of whether it was arbitrary or harmful to older employees. Moreover, it erroneously rejected legitimate explanations for the differences in benefits provided.

Westinghouse put forward a number of legitimate reasons in explanation of its post-employment severance and retirement plan. It explained that denial of severance benefits was based on eligibility for post-termination benefits, seniority, and the dates and reasons for termination. Moreover, Westinghouse established that the value of the retirement package for older employees was equal to or greater than the severance package received by others based upon actuarial calculations. The court rejected these factors, however, and unreasonably found an age element in each one. The result of the court's conclusion is as follows: if age is present in any form in the factors that determine the eligibility for or value of employer provided benefits, an employer will be liable regardless of whether older employees are adversely affected.

The approach taken by the court below not only misconstrues the requirements of the ADEA, but, in addition, creates confusion for employers trying to comply with parallel provisions of Title VII and the Equal Pay Act, both of which provide defenses similar to section 4(f)(1) of the ADEA. The Equal Pay Act and Title VII prohibit sex-related discrimination in compensation and benefits. The Equal Pay Act's "factor other than sex" defense[15] provided the statutory precursor to and conceptual model for the ADEA's section 4(f)(1) reason-

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[15] The Equal Pay Act excepts from its prohibitions "a differential based on any factor other than sex . . . ." 29 U.S.C. § 206(d)(1)(iv).

able factor other than age defense.[16] Under Title VII and the Equal Pay Act, legitimate business efforts of employers and unions to fashion a satisfactory and affordable employee benefit plan constitute a factor "other than sex" that may protect a company from discrimination claims, even though gender correlations may exist as part of the plan. *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 254 (6th Cir. 1988).[17] In *J.C. Penney*, the Sixth Circuit adopted a "legitimate business reason" standard for determining what constitutes a reasonable "factor other than sex." 843 F.2d at 253. In so doing, the court noted that an employer choosing a comprehensive "benefit package faces the challenge of maximizing employee satisfaction while minimizing or controlling cost." 843 F.2d at 253. Moreover, the court stated emphatically that employers and unions "must be allowed reasonable latitude" in framing such benefit plans. *Id.* at 254.

In a similar case, the Ninth Circuit rejected the EEOC's argument that the decision in *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), prohibits cost-related defenses in cases involving sex-based cost differentials in an employee benefit plan. *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984). In *Wambheim*, the court held that an employer did not discriminate under Title

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[16] Stacy, *A Case against Extending the Adverse Impact Doctrine to ADEA*, 10 Employee Rel. L.J. 437, 446 (1984-85).

[17] In this case, the Sixth Circuit rejected an EEOC charge of sex discrimination in a company's compensation and benefit plan in violation of Title VII of the Civil Rights Act of 1964. 843 F.2d at 252. Section 703(h) of Title VII incorporates by reference the affirmative defenses to wage discrimination claims which are set forth in the Equal Pay Act (one of which is differentiation based on "any other factor other than sex"). *Id.* Although distinguishable in some circumstances, standards under Title VII are sometimes considered by courts when reviewing age discrimination claims under the ADEA. *E.g., Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

VII in the payment of benefits where it could show sex-related differences were based upon legitimate business justifications.[18]

Thus, an employer like Westinghouse is justified in adopting a plan which attempts to give all its employees "the biggest 'bang for the buck' . . . ," even though it may accomplish its objective through a budget conscious, no "double-dipping" policy. *EEOC v. J.C. Penney Co.*, 843 F.2d at 254. This is especially true where, as in this case, the plan provides benefits of equal or greater actuarial value to the older employees claiming discrimination.

Unless the petition for a writ of certiorari is granted, the Third Circuit's decision will fuel needless confusion in the interpretation of statutory defenses related to compensation and benefits under section 703(h) of the Civil Rights Act and section 206(d)(1) of the Equal Pay Act. Thus, the Third Circuit's decision will not only create confusion for those attempting compliance with the ADEA, but will also exacerbate that confusion by upsetting parallel statutory standards that govern the sex-related components of benefit and compensation plans. This will cause further disruption and inflict needless burdens upon those responsible for developing compensation and pension plans in this country.

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[18] Certain Title VII standards are inapplicable to the ADEA. For example, this Court in *Manhart*, 435 U.S. 702, rejected under Title VII the use of sex-based actuarial factors which result in differences in benefits. In many ADEA cases, however, including the instant case, it is impossible to ignore age-based actuarial data in pension and retirement-related plans. As noted by this Court in *Manhart*, 435 U.S. at 718, its decision did not "call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan." As also discussed *supra*, footnote 4, Title VII involves immutable characteristics like sex. Age, however, is distinct because it is a universal characteristic.

E. The Third Circuit's Decision Unreasonably Intrudes Upon The Ability Of Employers And Unions To Develop Compensation And Benefit Plans That Uniquely And Fairly Meet The Needs Of All Employees Involved In A Plant Closing Or Relocation.

The decision of the Third Circuit, if allowed to stand, will severely limit the ability of management and labor to tailor programs which suit the unique and particular needs of employees in a given industry and at a given location.

Plant closings, although unavoidable, inflict hardship on all affected employees. The burdens that follow a plant closing do not discriminate. They hurt older workers to be sure, but are no kinder to a young father with children, or a single mother. Thus, it is entirely reasonable and, indeed, essential, that unions and employers strive to develop suitable plans which will help provide a safety net for *all* employees who might be affected by a plant closing or relocation.

Westinghouse and its unions, like employers and unions in many industries, including members of Amicus, have over a long period of time attempted to fairly allocate available resources among all affected workers to help ease the transition associated with a plant closing. The product of this bargaining in Westinghouse's case was a plan which, in cases of plant closure or work relocation, provided employees with one of two basic post-employment benefits—immediate retirement benefits, or severance and deferred retirement benefits—but not both. In finding a violation of the ADEA in this case, the court below has, in effect, prohibited employers and labor unions from establishing integrated severance and pension benefit plans through good faith negotiations.

If the Third Circuit's decision is left standing, it will render invalid and unlawful many similarly integrated programs intended to ameliorate the effects of plant closing or relocation. Because post-employment benefit funds

are not unlimited, the decision below will force employers and unions to reconsider the feasibility of providing severance pay. Before Westinghouse and its unions developed an integrated plan for plant closure, only employees eligible for retirement benefits received benefits at the time of a plant closing. A return to this system would leave workers ineligible for pensions without financial resources for relocation, retraining, and other transition expenses.

Employers and labor unions could also choose to make severance pay available to all employees, but would have to offset the increased cost of severance pay by limiting increases in pension benefits. Such action would produce a result which even the Third Circuit would have to regard as being nondiscriminatory, but which nevertheless would have a negative effect on older employees.[19]

AMI submits that the collective bargaining process provides the most appropriate vehicle for allocating available resources among employees at the time of plant closings or relocations, and that the decision of the Third Circuit unnecessarily intrudes on that process. It is a traditional function of labor unions and the collective bargaining process to attempt to accommodate the interests of all employees. The development of a suitable plant closing program requires that labor and management consider

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[19] Congress most recently demonstrated its concern about the negative impact of plant closings through the enactment of The Worker Adjustment and Retraining Notification Act (WARN), Pub. L. No. 100-379, 102 Stat. 890 (1988) (to be codified at 29 U.S.C. §§ 2101-2109). In enacting WARN, Congress sought to provide some protection for workers with respect to lay-offs and plant closings by requiring notice of such closings and lay-offs under certain circumstances. Congress, however, did not go as far as the Third Circuit by mandating severance payments to all employees, regardless of entitlement to other post-employment income benefits. Thus, the limited scope of WARN implies a continued congressional desire to defer the issue of post-employment benefits to collective bargaining. Congress saw no need to provide the type of extraordinary benefit to older workers faced with a plant closing now being mandated by the Third Circuit.

a wide variety of information, including the availability of suitable jobs in a locality, the specific demographic characteristics of the work force, the general financial wherewithal of the members of the work force, and the desires of employees to have severance pay, retirement or early retirement options.[20]

Members of AMI have utilized the collective bargaining process to tailor programs that provide employees flexibility in selecting post-employment benefits. For example, companies and unions in the meat industry have historically agreed to plant closing plans that allow employees to select a variety of benefit options, some of which maximize severance benefits and others which enhance retirement income. Under these option plans, the employees decide themselves which benefit option best serves their particular interests. The court below has undermined this freedom of choice by unreasonably tying the hands of the parties and precluding them from developing through collective bargaining benefit plans that uniquely meet their needs.

This Court has in the past recognized the important role that collective bargaining plays in the context of discrimination cases. In upholding the validity of a collectively bargained seniority system, the Court wrote in *California Brewers Association v. Bryant*, 444 U.S. 598, 608 (1980) (citations omitted) that:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. It does not behoove a court to second-guess either that process or its products. Seniority systems, reflecting as they do, not only the give and

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[20] *See* King, *The ADEA and Employee Benefit Plans*, in *Age Discrimination in Employment Act, A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* 307, 325-27 (M. Lake ed. 1982).

take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes.

In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), this Court upheld a collectively bargained seniority system against a claim that the agreement resulted in unlawful discrimination on the basis of religion, writing that: "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national policy . . . ." *Id.* at 79; *see also United Mine Workers v. Robinson*, 455 U.S. 562, 574-76 (1982).

There was no compelling reason for the court below to undermine a practice which "lies at the core of our national policy." Through bargaining, the parties did establish a fair, comprehensive plan for dealing with plant closings, which in all cases treated older workers at least equal to younger workers, and in many instances more favorably than younger employees.

The impact of the Third Circuit's decision upon the collective bargaining process will be significant. A recent employer survey indicated that eighty-two percent of the respondents paid severance benefits to laid off or terminated employees at some time. *Personnel Policies Forum: Severance Benefits and Outplacement Services* (BNA) No. 143 (Dec. 1986). According to that survey, severance benefits have become more prevalent "[a]s organizations throughout the United States strive to streamline their work forces in the face of tighter budgets, foreign competition, and a growing number of corporate mergers . . . ." *Id.* at 1. It is common for such plans to deny severance benefits to employees who are eligible for pensions. Another survey indicates that approximately forty-five percent of the private collectively bargained benefit plans impose such a restriction. *Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts* (BNA) No. 167, at 53:4 (Apr. 24, 1986).

Given the number of severance plans which are in effect, the substantial number of those plans which deny severance benefits to employees of retirement age, and the nationwide impact of the Third Circuit decision, it becomes readily apparent that thousands of employers and employees will be affected by the decision.

The obvious way to satisfy the rule established by the Third Circuit in this case is to eliminate severance pay or limit pension benefits. It simply is not reasonable to merely assume that employers have the financial wherewithal to pay both existing post-employment benefits and the additional severance benefits mandated by the Third Circuit. Thus, the ultimate result of the Third Circuit's decision will be to upset many pension and severance plans bargained in good faith over many years. However, employees who now enjoy post-employment income protection cannot be expected to readily accept the elimination of severance pay or the reduction in pension benefits. Employers, on the other hand, particularly in those industries which are financially strapped, cannot be expected to simply supplement current severance plans with a new influx of cash. The decision, therefore, holds the potential for creating substantial new labor unrest.

II. THE THIRD CIRCUIT'S DECISION THAT SECTION 4 (f)(2) OF THE ADEA PROTECTS ONLY THOSE BENEFIT PLANS WHICH REFLECT AGE-RELATED COST FACTORS IMPOSES A STANDARD NOT INTENDED BY CONGRESS AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Third Circuit interpreted the ADEA's section 4(f)(2) defense[21] as applying only to those employee

[21] Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), provides that it shall not be unlawful for an employer or labor organization "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . ."

benefit plans that reflect age-related cost factors, holding: "[i]n order to qualify as exempt under § 4(f)(2), a plan must involve age-related cost factors: *i.e.* the cost of providing benefits pursuant to the plan must increase with age." 869 F.2d at 710 (citations omitted).

A conflict exists among the circuit courts regarding whether section 4(f)(2) of the ADEA protects only those plans that reflect age-related cost factors. In addition to the Third Circuit in the present case, the Sixth Circuit has held that section 4(f)(2) applies only to those plans where the cost of providing the benefit increases with age. *Betts v. Hamilton County Bd. of Mental Retardation*, 848 F.2d 692, 694 (6th Cir.), *prob. juris. noted sub nom. Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 256 (1988). The Seventh Circuit also adopts this view. *Karlen v. City Colleges*, 837 F.2d 314, 319 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988).

In contrast, the Second, Fifth, Ninth, and Tenth Circuits have held that age-related cost justification is not the exclusive means of establishing that the section 4(f)(2) defense applies. *EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988); *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988); *Cipriano v. Board of Educ.*, 785 F.2d 51, 54-55 (2d Cir. 1986); *Alford v. City of Lubbock*, 664 F.2d 1263, 1268-70 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 216-17 (5th Cir. 1974).[22]

This issue is also raised in *Public Employees Retirement System v. Betts*, No. 88-389 (U.S. argued Mar. 28,

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[22] In the best reasoned decisions, the courts have rejected the Third Circuit's narrow view of section 4(f)(2) as applying only to the statutorily enumerated benefit, retirement, pension, or insurance plans. These decisions conclude that the list is only illustrative and indicate that plans that do not have an age-based cost relationship, such as profit-sharing plans, are protected by section 4(f)(2). *Alford*, 664 F.2d at 1272, 1272 n.10; *Brennan*, 500 F.2d at 215-17.

1989). Thus, this Court may resolve this issue in the *Betts* case. In such case, Amicus Curiae agrees with Westinghouse that the Court should dispose of that aspect of Westinghouse's petition as is appropriate in light of the Court's decision in *Betts*.

The current uncertainty engendered by the split among the circuit courts of appeal with respect to this issue must be resolved. Many contracts in the meat packing industry, as well as other industries, cover thousands of employees, and contain provisions which in some manner integrate severance and retirement pay benefits. AMI submits that such plans fulfill a very important purpose, and in some industries hard hit by plant closings, an essential function. Given the national scope of these contracts, however, unions and employers may have to capitulate to the holding of the Third Circuit unless the issue is resolved expeditiously and authoritatively by the Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF PETITION FOR CERTIORARI

This brief in support of the petition for certiorari is submitted with the written consent of all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The Association of Private Pension and Welfare Plans ("APPWP") is a nonprofit organization founded in 1967 to protect and foster the growth of the Nation's private employer-sponsored employee benefit system. The APPWP has more than 400 members, including many large and small plan sponsors, as well as such plan support organizations as investment firms, banks, insurers, actuarial firms, and other professional benefit organizations.

Collectively, the APPWP's members have substantial experience in the design and administration of benefit plans of all types. APPWP members either sponsor plans themselves or provide services to more than 70,000 benefit plans; these plans collectively cover millions of employees.

The issues presented by this case are of critical importance to the members of the APPWP. The decision below has broad implications for the ability of employers to provide severance pay benefits to non-retirement-eligible workers. Because it prohibits integration of severance and pension benefits, the decision can be expected to reduce significantly the scope of severance programs for both younger and older workers.

Moreover, the decision below injects substantial confusion into the design and administration of employee benefit plans. In considering two critical concepts common to the Employee Retirement Income Security Act ("ERISA") and the Age Discrimination in Employment Act ("ADEA"), the court below adopted ADEA definitions of those concepts that are contrary to their established meaning under ERISA. As a result of those conflicting definitions, plans fully complying with ERISA may be invalidated under complementary provisions of the ADEA. Because the decisive resolution of these issues is of great significance to the APPWP and its members, it urges a grant of certiorari in this case.

STATEMENT

The APPWP adopts the statement of facts set forth in the petition for certiorari. This statement is limited to the facts most important to the APPWP's position in this brief.

In the 1960's Westinghouse Electric Corporation and its unions began to develop a benefits program for employees involuntarily terminated as a result of plant

closings or relocations. *See generally* Appendix to the Petition ("Pet. App.") at 54a-59a. Prior to that time the only terminated employees who had any form of income protection were those eligible for retirement benefits, including early retirement benefits, under the Westinghouse pension plan. At the unions' request, however, Westinghouse created a more limited severance benefit plan for employees ineligible for retirement. *See id.* at 54a. In subsequent years, the pension plan was amended to include special early retirement eligibility to protect workers near retirement who were involuntarily terminated. *See id.* at 59a.

It is undisputed that Westinghouse viewed the severance and pension plans as forming an integrated benefits program and implemented them accordingly so that all employees with sufficient time on the job would be afforded some type of income protection in the event of involuntary termination. *Id.* at 19a-20a. To assure a rational allocation of benefit resources between retirement-eligible and non-eligible employees, the plan provided, prior to 1982, that employees eligible for immediate retirement benefits (including special early retirement benefits) were not also eligible for severance benefits. *Id.* at 54a-57a. After that date, however, the benefits program allowed retirement-eligible employees to elect severance benefits or early retirement, but did not allow them to choose both. *Id.* at 57a-59a.

In considering whether Westinghouse's plan violated section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), the court below apparently "accept[ed] Westinghouse's contention that the value of early retirement benefits is actuarially greater than or equal to the value of [severance pay] plus a deferred pension." Pet. App. at 16a. However, the court of appeals rejected the claim that the Westinghouse severance and pension benefits were integrated and determined that the severance program should be considered in isolation.

In finding no integration, the court of appeals acknowledged but completely disregarded undisputed evidence showing that: (1) the two benefits had a common purpose of providing employees with a source of income maintenance after involuntary termination; (2) the pension and severance pay plans were negotiated contemporaneously for twenty-five years; (3) pension eligibility requirements were continually liberalized to maximize the number of employees qualified for early retirement; and (4) severance pay benefits were increased contemporaneously with increases in the value of pension and insurance benefits. *Id.* at 25a. In the Third Circuit's view, severance and pension benefits were not integrated because they were perceived as serving different purposes and because the retirement benefits were vested, while severance benefits were not. *Id.* at 17a, 27a. In finding the 1982 plan—which provided pension eligible employees the option of selecting either severance or pension benefits—violative of section 4(a)(1), the court of appeals held that "severance pay is a fringe benefit for which vested early or selected retirement benefits cannot be a substitute." *Id.* at 26a. Thus, the Third Circuit's decision holds, as a matter of law, that severance benefits cannot be integrated with pension benefits and calls into question whether a non-vested benefit can ever be integrated with any vested benefit for purposes of the ADEA.

The Third Circuit also concluded that severance pay plans cannot qualify as "employee benefit plans" entitled to exemption under section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). Pet. App. at 27a-29a. The court of appeals held, again as a matter of law, that severance pay is a mere "fringe benefit," not an employee benefit plan that satisfies section 4(f)(2). *Id.* at 26a. That conclusion of law is inconsistent with definitions of "employee benefit plan" under the provisions of ERISA.

REASONS FOR GRANTING THE WRIT

I. IF THE THIRD CIRCUIT'S DECISION IS ALLOWED TO STAND, IT WILL HAVE AN IMMEDIATE ADVERSE IMPACT ON EMPLOYERS AND EMPLOYEES BY DISRUPTING SEVERANCE BENEFIT PROGRAMS

The result reached by the Third Circuit is antagonistic to the interests of employees and employers alike and contravenes the express congressional interest in protecting employees affected by plant closings.[1] For example, a recent Bureau of Labor Statistics report estimates that during the first half of this decade, an average of 2.2 million American workers lost their jobs each year because of plant closings or mass layoffs.[2] For employees not yet eligible for retirement, such closings and layoffs can mean economic disruption or disaster. Thus, private efforts to provide severance pay benefits to maintain the incomes of non-retirement-eligible employees is an obvious benefit to the nation's workers.

Like Westinghouse, thousands of employers have negotiated agreements or unilaterally established programs that extend a more limited form of income protection to non-pension-eligible workers whose employment is terminated through no fault of their own. A recent survey shows that approximately forty percent of the private collectively-bargained benefit plans imposing restrictions on receipt of benefits deny severance benefits to employees

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[1] Congress has recently recognized that plant closings and force reductions can have devastating effects on employees. Workers Adjustment Retraining and Notification Act of 1988, Pub. L. 100-379, 102 Stat. 890 (1988). That legislation required that employers provide notice to employees of planned plant closings. *Id.* at § 3(a).

[2] *See* F.W. Horvath, "The Pulse of Economic Change: Displaced Workers of 1981-85," *Monthly Labor Review* (June 1987) U.S. Department of Labor, Bureau of Labor Statistics, and Appendix III.

who are eligible for pensions.[3] By defining these "severance benefits" as an alternative to pension benefits, rather than a supplement to them, employers are able to design a rational and coordinated program that extends some form of income protection to a broader group of employees. This policy of benefit "integration" serves an important objective—expressly recognized by ERISA—of encouraging adoption of pension plans and at the same time encouraging that benefit costs be controlled to permit their extension to the greatest number of workers. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515-17 (1981).

The same policy of benefit integration condemned by the Third Circuit is regularly used by the federal government with respect to its own employees. Federal employees have been protected from age discrimination since 1974. 29 U.S.C. § 633a(a). Yet Congress has broadly prohibited the payment of severance benefits to federal employees who are entitled to retirement benefits. *See* 5 U.S.C. § 5595(a)(2)(B)(iv); *see also* 14 U.S.C. §§ 286(b), 327(B); 33 U.S.C. § 853h(e).[4] Moreover,

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[3] *See Basic Patterns: Income Maintenance*, Collective Bargaining Negotiations and Contracts (BNA) No. 1144, at 53:3 (1989).

[4] 5 U.S.C. § 5595(a)(2)(B)(iv) prohibits the payment of severance benefits to

> an employee who is subjected to . . . any . . . retirement statute or retirement system applicable to an employee as defined by section 2105 of this title or a member of a uniformed service and who, at the time of separation from the service, has fulfilled the requirements for immediate annuity under such a statute or system.

5 U.S.C. § 2105(a) in turn defines the affected employees as follows:

> (a) For the purpose of this title, "employee" . . . means an officer and an individual who is—
>
> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> (A) the President;

Congress left that prohibition intact after application of the ADEA to federal workers in 1974, despite repeated legislative reconsideration of section 5595.[5] As a result, federal workers generally are precluded from collecting both retirement benefits and severance pay.[6]

Under the Third Circuit's decision on benefit integration, however, provision of severance benefits to private sector employees will be threatened.[7] Employers that

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(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) the adjutants general designated by the Secretary concerned under section 709(c) of title 32, United States Code;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

[5] After its enactment in 1967, section 5595 was amended in 1978, 1979, 1980, and 1988 without modification of the prohibition on payment of severance benefits to retirement-eligible federal employees. Congress has also enacted other such prohibitions since the effective date of 29 U.S.C. § 633a(a). *See, e.g.*, 10 U.S.C. §§ 1186(b), (c); 10 U.S.C. §§ 1174(e), (h).

[6] As this Court has recognized, it cannot lightly be assumed that Congress intended to penalize private employers for a practice that the government itself employs. *See Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 90-91 (1973).

[7] The adverse impact of the Third Circuit's decision is illustrated by the first district court decision applying its holding. In *EEOC v. USX, Corp.*, 19 E.B.C. 2341 (E.D. Pa. 1989), the court reluctantly invalidated a benefits program that included an offset of pension and severance benefits, stating that it would have reached a different result had it not been controlled by the decision below.

In contrast to the Third Circuit, other federal courts have concluded that the ADEA permits employers to allocate income main-

previously provided special income protection for employees affected by plant closings will be put to a difficult choice. They may continue to make severance pay benefits available to their employees only by providing a supplemental benefit to those who already are entitled to a pension. However, that choice would come at enormous cost to employers and might prove prohibitive for contracting industries facing substantial force reductions. Thus, the foreseeable result of the Third Circuit's decision will be the elimination or reduction of severance benefits that already exist, as well as the creation of a significant disincentive for additional employers considering adoption of such programs.[8]

This result would not serve the ADEA objective of protecting the employment rights of older workers. It would plainly be contrary to the interests of employees, who, without regard to age, benefit from more comprehensive income loss protection. At different points in

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tenance protection among retirees and non-pension eligible employees. In *Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593, 594 (4th Cir. 1985), the Fourth Circuit squarely held that "no discrimination within contemplation of the ADEA resulted to pension-eligible employees" whose eligibility for severance pay was conditioned upon deferral of certain pension benefits they would otherwise have received. Similarly, the court in *Abenante v. Fulflex, Inc.*, 701 F. Supp. 296, 300 (D.R.I. 1988), *appeal pending*, No. 89-1179 (1st Cir. filed Jan. 30, 1989), found no ADEA violation in a requirement that the present value of vested pension benefits be deducted from severance benefits paid retirement-eligible workers. *See also Khan v. Grotnes Metalforming Systems, Inc.*, 679 F. Supp. 751, 762 (N.D. Ill. 1988); *EEOC v. Firestone Tire & Rubber Co.*, 650 F. Supp. 1561, 1567 (W.D. Tenn. 1987).

[8] The impact of the Third Circuit's decision is to skew the allocation of benefit resources so that a disproportionate amount of each benefit dollar is devoted to one unique situation—benefits available to pension-eligible employees in a plant closure. Ironically, that result may injure older workers, rather than benefiting them, since the added costs mandated by the Third Circuit may be reflected in reduced improvements to other generally available benefit programs, including pensions.

their careers, employees may be protected by different aspects of a broad integrated program. *See, e.g., Patterson v. Independent School District #709*, 742 F.2d 465, 468 (8th Cir. 1984). Indeed, older workers who lack sufficient service credit for pension entitlement may be protected *only* by severance benefits.

In light of the threatened impact of the Third Circuit's decision on thousands of employee benefit programs, review by this Court is warranted.

II. CONCEPTS COMMON TO ERISA AND THE ADEA MUST BE CONSTRUED AND APPLIED IN A CONSISTENT MANNER

The decision below turns on the definition of two key concepts common to both ERISA and the ADEA: "plan integration" and "employee benefit plan." Although Congress intended that these statutes be consistently construed and applied, the court below defined these concepts under the ADEA in a manner directly contrary to their established meanings under ERISA. The Third Circuit decision thus subjects employers to the risk that a plan designed to comply with complementary provisions of ERISA and the ADEA will be held invalid under statutory definitions unique to the ADEA.

The legislative history of the ADEA makes clear Congress' intent that ERISA and the ADEA be implemented consistently. As first proposed, the ADEA did not contain a comprehensive exemption for employee benefit plans.[9] As a result the provision drew criticisms from legislators and others during Senate hearings. *See Age*

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[9] The original version of section 4(f) provided:

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act.

113 Cong. Rec. 2794 (1967).

Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor & Public Welfare, 90th Cong., 1st Sess. 27, 29-30, 279-80, 295-97, 315-17 (1967). Senator Javits advocated replacement of the proposed language with an amendment that made it lawful for an employer:

> to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual.

113 Cong. Rec. 7077 (1967). He did so because, in his view, "the age discrimination law is not the proper place to fight this particular battle." *Id.* at 7076. The particular battle to which Senator Javits referred was the regulation of employee benefit plans. Instead, the "proper place" was the "recently introduced . . . comprehensive bill"—a proposal that became ERISA—designed to "deal with this problem." *Id.*

Thus, from the outset the ADEA recognized that separate legislation (ERISA) would be the primary source of regulation for employee benefit plans, and it created a corresponding ADEA exemption for plans subject to ERISA.[10] The necessity for coordinating these complementary statutory enactments has been explicitly reaffirmed in subsequent amendments to ERISA and the ADEA. In 1978, while considering proposals to raise the upper age limit on the ADEA's coverage, members of Congress expressed concern that the proposed amendment

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[10] Fundamental principles of statutory construction confirm this result, requiring that terms used in interrelated statutes be interpreted consistently. *See* N. Singer, *Sutherland Statutory Construction* (4th ed.) § 51.03 (1984 & Supp. 1989); *see also Kentucky Utilities Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985); *Crabtree v. Baptist Hospital of Gasden, Inc.*, 749 F.2d 1501, 1503 (11th Cir. 1985); *Lopez v. Bulova*, 582 F. Supp. 755, 763 (D.R.I. 1984).

could substantially increase benefit costs.[11] Only after receiving the advice of the Department of Labor that the proposed amendments would not require accrual of additional pension benefits by employees who worked beyond the plan's normal retirement date and "would not interfere with any of the provisions of ERISA"[12] did the Committee report the amendments to the Senate.[13] This legislative history evidences a clear intent to coordinate the two statutes.

In 1986, Congress added new ADEA section 4(i), 29 U.S.C. 623(i), which prohibits the cessation of benefit accruals under an "employee pension benefit plan" because of the attainment of any age. It contemporaneously amended ERISA and the corresponding provisions of the Internal Revenue Code ("Code") to include nearly identical statutory language.[14] In so amending the ADEA, Congress mandated that "the provisions of ADEA, ERISA, and the [Internal Revenue] Code . . . are to be interpreted in a consistent manner."[15] Moreover, Congress specifically instructed the Secretary of Labor, the

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[11] *See Von Aulock v. Smith*, 720 F.2d 176, 182 (D.C. Cir. 1983) (citing S. Rep. No. 493, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 508).

[12] Letter from Donald Elisburg, Assistant Secretary, Department of Labor, to Senator Harrison Williams, *reprinted in* 1978 U.S. Code & Cong. Admin. News at 517.

[13] The relevant House Committee report also reflected the fact that the proposed amendments were designed to complement ERISA requirements. *Von Aulock*, 720 F.2d at 183 (citing H.R. Rep. No. 527, 95th Cong., 1st Sess. 9 (1977)).

[14] ERISA §§ 204(b)(1)(H), 204(b)(2)(A), 29 U.S.C. §§ 1054(b)(1)(H), (b)(2)(A); Code sections 411(b)(1)(H), 411(b)(2).

[15] The Conference report stated that:

> The conferees intend that the provisions of ADEA, ERISA, and the Code that are amended to prevent the reduction or cessation of benefit accruals on account of the attainment of age are to be interpreted in a consistent manner and do not

Secretary of the Treasury, and the EEOC to consult and coordinate with one another to insure the issuance of consistent rulings and regulations pursuant to these statutory provisions. Conference Report at 382.

The 1986 amendments went beyond an insistence that terms common to ERISA and the ADEA be interpreted consistently. Congress also recognized the preeminent role of ERISA in regulating employee benefit plans:

> It is the intention of the conferees, in adopting the amendments to ADEA (new sec. 4(i)), that the requirements contained in section 4(i) related to an employee's right to benefit accruals with respect to an employee benefit plan (as defined in sec. 3(2) of ERISA)[16] shall constitute the entire extent to which ADEA affects such benefit accrual and contribution matters with respect to such plans on or after the effective date of such provisions . . . .

Id. Congress thus anticipated that in order to maintain consistency in the interpretation of terms common to ERISA and the ADEA, those terms would be defined as provided in ERISA.

The decision in this case demonstrates the critical need for such coordination of the application of common terms. In concluding that the Westinghouse plan violated section 4(a)(1) of the ADEA, the Third Circuit formulated "ADEA definitions" for the concepts of "integration" and "employee benefit plan" that are completely at odds with the established meaning of those concepts under ERISA.

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intend any differences in language in the provisions to create an inference that a difference exists among such provisions.

Conference Report Providing for Reconciliation Pursuant to Section 2 of the Concurrent Resolution on the Budget for Fiscal Year 1987, H.R. Rep. No. 1012, 99th Cong., 2d Sess. 378-79 (1986) [hereinafter, "Conference Report"].

[16] Section 4(i) of the ADEA expressly incorporates the ERISA definition of employee pension benefit plan. 29 U.S.C. § 623(i)(9)(A).

A. The Decision Below Defined "Plan Integration" Under the ADEA in a Manner Directly Contrary to its Established Meaning Under ERISA

Under ERISA, plan integration is an important tool that encourages employers to adopt pension plans and enables them to allocate benefit resources rationally among the greatest number of people. This Court recognized in its unanimous decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), that ERISA expressly authorizes integration as a means of containing benefit costs and assuring the delivery of benefits to the greatest number of employees. The Court there observed that prohibiting integration could injure employees by slowing the growth of or eliminating certain benefits. *Id.* at 515 (citing H.R. Rep. No. 807, 93d Cong., 2d Sess. 69 (1974)).[17] The Court thus concluded that Congress approved plan integration to give "employers avenues for cutting the cost of their pension obligations." 451 U.S. at 517.

Alessi is significant here beyond its general endorsement of integration, however. It specifically concerned the integration of benefits that were designed to serve different purposes and that were both vested and nonvested—the very issues held by the Third Circuit to be decisive here. The specific benefits provision at issue in *Alessi* reduced a retired employee's pension benefits by an amount equal to any workers' compensation award for which the retired employee was eligible. *Id.* at 507. The

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[17] The Court noted:

> It is particularly pertinent for our purposes that Congress did not prohibit "integration," a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees.

451 U.S. at 514.

Court rejected a claim that the challenged provisions effected a prohibited forfeiture of pension rights, holding that in light of that congressional endorsement of integration, offsets against pension benefits for workers' compensation awards should be allowed even though such awards served a very different purpose and were not vested. *Id.* at 516-17.

The Third Circuit's constricted definition of integration ignores both the congressional endorsement of integration and the long history of collective bargaining of integrated benefit plans. Indeed, this case exemplifies the situation Congress sought to avoid in approving integration, since denial of integration will necessarily create economic pressure to reduce or eliminate severance benefits. The Third Circuit's decision that the Westinghouse plan could not, as a matter of law, be integrated thus creates a significant inconsistency in the definition of "integration" under ERISA and the ADEA.

In contrast to the decision here, numerous lower courts have endorsed benefit integration in this context.[18] The Third Circuit itself recently affirmed the holding in *Vintilla v. United States Steel Corp.*, 606 F. Supp. 640, 643 (W.D. Pa. 1985), *aff'd mem.*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 475 U.S. 1141 (1986), that ERISA permits the integration of pension and severance benefits. In addition, integration of vested and non-vested benefits has been accepted in other contexts. For example, the integration of pension benefits with social security benefits is expressly authorized in proposed regulations promulgated by the Internal Revenue Service ("IRS") to implement section 4(i) of the ADEA, as well as the corresponding provisions of ERISA and the Code. Prop. IRS Reg. § 1.411(b)-2(d)(2)(iii). These proposed regulations govern the interpretation of the ADEA, as well as

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[18] *See, e.g., Cipriano v. Board of Education*, 785 F.2d 51, 54-55 (2d Cir. 1986); *Britt*, 768 F.2d at 595; *Patterson*, 742 F.2d at 467; *Abenante*, 701 F. Supp. at 300.

the Code and ERISA. *See* preamble to IRS Proposed Rule on Continued Plan Accruals Past Normal Retirement Age, 53 Fed. Reg. 11876, 11878 (Apr. 11, 1988).

The Third Circuit thus ignored congressional, regulatory, and judicial authority to the contrary in holding as a matter of law that severance benefits could never be integrated with vested pension benefits. As a result, the court of appeals has injected substantial confusion into the integration issue and left employers virtually without guidance in negotiating and establishing plans governed by both ERISA and the ADEA.

B. The Third Circuit's ADEA Definition of "Employee Benefits Plan" Cannot Be Reconciled with the ERISA Definition of that Concept

The Third Circuit's delineation of the scope of the ADEA section 4(f)(2) exception for bona fide "employee benefit plans" also failed to take account of the established meaning of that term under ERISA. The Third Circuit concluded that severance benefits can *never* qualify as "employee benefit plans" within the meaning of that term in section 4(f)(2). Under ERISA, however, severance benefits are clearly "employee benefit plans," and, as such, are subject to that Act's substantial regulation. A severance plan may be either a pension or a welfare plan, but in either event, it is an "employee benefit plan" under ERISA. Section 3(3) of ERISA provides:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. § 1002(3). As used in that provision, the term employee *welfare* benefit plan includes a "plan, fund, or program . . . for the purpose of providing for its partici-

pants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment." ERISA § 3(1), 29 U.S.C. § 1002 (1). The term employee *pension* benefit plan includes a "plan, fund, or program which . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . ." ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). Accordingly, Department of Labor regulations provide that a severance plan that pays benefits on account of the termination of an employee's service will be considered a *pension plan* unless it meets certain restrictive criteria, in which event it will constitute a welfare plan. 29 C.F.R. §§ 2510.3-1, 3-2. Under either of these subclassifications, severance pay is clearly an employee benefit plan for ERISA purposes.

This analysis of ERISA's terms is confirmed by the Court's recent decision in *Massachusetts v. Morash*, 57 U.S.L.W. 4429 (Apr. 18, 1989), which distinguished between employee benefit plans and certain compensation practices or fringe benefits, such as the payment of overtime pay, shift premiums, and pay while absent on account of illness. In holding that vacation pay generally constitutes a compensation practice that is not governed by ERISA, the Court made clear that "plans to pay employees severance benefits, which are payable *only* upon termination of employment, are employee welfare benefit plans within the meaning of [ERISA]." *Id.* at 4431; *see also Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 325 (2d Cir. 1985), *aff'd mem. sub nom. Roberts v. Burlington Industries, Inc.*, 477 U.S. 901 (1986).[19]

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[19] In *Gilbert* the Second Circuit held that severance pay constitutes a benefit plan under ERISA. 765 F.2d at 325. The court of appeals incorporated practical considerations into its decision, noting that employers involved in substantial force reductions may owe a large amount in severance pay, and employee interests are protected if severance benefits are brought within ERISA. *Id.* at 326.

Even the EEOC has acknowledged that severance pay is not precluded from classification as an employee benefit plan. Despite taking the position in this case that severance plans are not subject to the protection of section 4(f)(2) of the ADEA, the agency is currently rethinking its position. In its Advance Notice of Proposed Rulemaking regarding a proposed rulemaking under section 4(f)(2), the EEOC specifically solicited comments on the following topics:

1. Which plans should be considered to be "employee benefit plans" under the ADEA; and

2. Should severance pay and/or sick pay plans be considered "employee benefit plans" under section 4(f)(2)?

53 Fed. Reg. 26789, 26790 (July 15, 1988).

The willingness of the Third Circuit to construe provisions common to ERISA and the ADEA without regard to established ERISA definitions and precedents is likely to disrupt benefit plan structure and administration. Clearly a severance pay plan designed to meet the definition of an "employee pension benefit plan" under ERISA would be subject to ERISA's comprehensive participation, vesting, and funding requirements. ERISA, Title I, Parts 2 and 3, 29 U.S.C. §§ 1052, 1053, 1082-85. Nevertheless, the Third Circuit's decision would deny that plan exemption under section 4(f)(2) because it would not constitute an ADEA "employee benefit plan."

The decision could also create turmoil for employers and plan administrators because an independent interpretation of the ADEA would call into question a host of pension plan provisions that are required or authorized by ERISA, but have a disparate impact on older employees. Without the protection of section 4(f)(2),

these provisions could violate the ADEA.[20] For example, section 401(a)(9) of the Code requires pension plans to begin to make benefit payments at age 70½ (subjecting the participants to tax liability for the payment), regardless of whether the participant has retired or requests such payments.[21] In addition, the Code provides that pension benefits may be reduced or offset by social security retirement benefits, Code section 401(a)(5)(D) and permits a social security supplement paid under a plan to terminate when an employee becomes eligible for social security benefits. Code section 411(a)(9); *see* ERISA § 204(b)(1)(G), 29 U.S.C. § 1054(b)(1)(G). Finally, the Code contains numerous requirements that limit the benefits of highly compensated employees, regardless of whether the affected employees are entirely or primarily within the protected class. *See, e.g.*, Code sections 401(a)(4), 410(b), 411(b)(1)(H)(v), 415.

Employers who must design a plan that applies to employees nationwide and conforms with requirements of both ERISA and the ADEA are provided no guidance, and considerable confusion, by the Third Circuit decision. Therefore, review by this Court is clearly warranted.

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[20] A hint of the potential for confusion and inconsistent rulemaking was graphically demonstrated when the EEOC issued proposed regulations under section 4(i) of the ADEA. 52 Fed. Reg. 45360 (Nov. 27, 1987). Those regulations were contrary to proposed rules subsequently published by the IRS under Code section 411(b). 53 Fed. Reg. 11876 (Apr. 11, 1988). Following a storm of controversy, the EEOC backed away from the position stated in its proposed regulations and indicated its intent to defer to the IRS in developing regulations in this area. *See* 54 Fed. Reg. 604 (Jan. 9, 1989).

[21] Similarly, Code section 401(a)(14) requires former employees to begin to receive benefits upon attaining the plan's normal retirement age, unless the employee elects otherwise. *See also* ERISA § 206(a), 29 U.S.C. § 1056.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted.

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IN THE
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OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether § 4(a)(1) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a)(1), precludes representatives of an employer and union from bargaining for, and agreeing to, a post-employment income maintenance program which provides retirement-eligible employees with more valuable early retirement benefits or less valuable severance payments, but not both.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS[1]

The National Public Employer Labor Relations Association ("NPELRA"), a non-profit association organized under the laws of Illinois, represents more than 2,000 labor relations and personnel professionals who work on behalf of states, counties, cities, and special governmental districts throughout the United States. These individuals have responsibility directly or indirectly for labor and employment decisions affecting in excess of 2.5 million public employees.

[1] Counsel for both parties have consented to the filing of this amicus brief.

Many governmental entities maintain, and many of NPELRA's members are involved in administering, regular and early retirement plans and other types of employee benefit plans. Some of these benefit plans are negotiated with representatives of employee groups or may be affected by collective bargaining agreements; others are created by state and or local law and regulation. Thus, the resolution of the issue presented in this case—involving whether § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), makes unlawful a post-employment benefit plan which provides retirement-eligible employees with either more valuable early retirement benefits or less valuable severance payments, but not both—and its impact on the stability of collectively bargained retirement/severance programs are of significant interest to NPELRA and its members.

STATEMENT

1. Petitioner, Westinghouse Electric Corporation ("Westinghouse"), provides a multi-faceted post-employment income maintenance program to its employees. Pet. App. at 8a-13a. Under the program in effect between 1979 and 1985, employees who satisfied certain eligibility requirements—relating to age, years of service, and circumstances of termination—could immediately begin receiving lifetime retirement benefits upon the termination of their employment with Westinghouse. *Id.* at 8a-13a.[2] Employees who did not satisfy these eligibility requirements, or who chose not to receive such immediate lifetime retirement benefits, could, upon their termination, receive less valuable post-employment benefits—specifically, deferred retirement benefits and, where the termination was through no fault of their own, immediate short-term layoff and income benefits ("LIB"). *Id.* at

[2] These lifetime retirement benefits included immediate monthly pension benefits for life; monthly pension supplements until the onset of Social Security benefits; and lifetime insurance benefits. *See* Pet. App. at 23a.

9a-13a. Westinghouse established these retirement and LIB provisions through negotiations with its employees' collective bargaining representatives;[3] it did so on the understanding that employees would be eligible for LIB (and deferred pension benefits) only if they were ineligible for, or chose not to receive, the more valuable, immediate lifetime retirement benefits. Pet. App. at 8a-13a; J.A. 515, 534-36, 1272-80, 1302-06.

Westinghouse and its employees' collective bargaining representatives first linked the provision of immediate retirement benefits and LIB in their 1960 negotiations. J.A. 568a, 534-36, 1409-10. In 1960, they negotiated a Pension and Insurance Agreement ("P&I Agreement") that provided immediate "early" retirement benefits to those employees who, at the time of their separation, were at least 60 years of age and had at least ten years of service. J.A. 1785-86, 1792, 1794, 1798. At the same time, Westinghouse agreed to add an LIB component to the P&I Agreement: this LIB component provided for a cash payment—equal to one week's pay per year of service—to those employees who, when terminated through no fault of their own, were ineligible for immediate retirement benefits. J.A. 534-35, 1409-10.

With this linkage between immediate retirement benefits and LIB in place, Westinghouse and its employees' unions in their subsequent negotiations increased the benefits available under both the pension and LIB components of the P&I Agreement and, concomitantly, expanded the pool of employees eligible to receive the more valuable immediate retirement benefits (instead of LIB). Pet. App. at 26a; *see also* J.A. 1302-06, 1324-27, 1344-46, 1598-99, 1696, 1704, 1720-21, 1765. For example, in 1973, they agreed that, in the event of a plant closing,

[3] Westinghouse has also provided its terminated management personnel with either immediate retirement or deferred pension and severance benefits under a program that largely parallels the collectively-bargained benefit program. Pet. App. at 10a-11a, 13a.

affected employees could apply for and receive "early" retirement benefits if they were between 55 and 60 years of age and had at least 10 years of service (*see* J.A. 1704); and, in 1979, they agreed that, in the event of a job movement or product line relocation as well, affected employees who satisfied certain liberalized age and service requirements could also receive these immediate early retirement benefits. J.A. 1599-1600. Throughout this period, however, the P&I Agreement continued to provide that employees who became eligible for the more valuable retirement benefits could not receive the less valuable LIB as well. *See* J.A. 1302, 1324, 1344, 1363.

In 1982, Westinghouse and its unions decided to give all retirement-eligible employees who were terminated through no fault of their own the option to elect deferred retirement benefits and LIB. But, in doing so, they once again made clear in both the pension and LIB components of the P&I Agreement that this was an "either-or" option —that is, that employees could choose immediate retirement benefits or deferred retirement benefits and LIB, but not both. Pet. App. at 12a-13a; *see also* J.A. 1272-80, 1549-50.

2. In November 1983, the Equal Employment Opportunity Commission ("EEOC") filed its complaint in this action. J.A. 15-20. In the complaint, as amended, the EEOC alleged, *inter alia*, that Westinghouse had "willfully" violated the ADEA by failing to pay LIB to involuntarily terminated individuals who had received immediate, lifetime retirement benefits. J.A. 16-17, 26-27, 39-40.

The district court agreed with the EEOC, concluding that Westinghouse's "denial of severance pay to employees who take retirement is age-based discrimination." Pet. App. at 85a. In so concluding, the district court determined that Westinghouse could not justify its actions based on its policy of providing employees with only one

post-employment income stream; in the court's view, pension and severance benefits "are distinct benefits with different purposes" and cannot be interchanged. *Id.* at 87a. It further concluded that the "bona-fide employee benefit plan" exemption of ADEA § 4(f)(2) did not protect Westinghouse's actions (*id.* at 91a), and that Westinghouse's violations of the ADEA were "willful." *Id.* at 97a.

3. Westinghouse appealed the district court's decision. The Third Circuit affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. at 1a-36a.

The Third Circuit first ruled that, by conditioning receipt of LIB on ineligibility for or election not to receive immediate retirement benefits, Westinghouse had treated older employees unfavorably because of their age in violation of § 4(a)(1) of the ADEA. Pet. App. at 16a. In so ruling, the court found that older employees had received only immediate retirement benefits, whereas younger employees had received "both severance pay and retirement benefits (when they reached the required age)." *Id.* at 16a-17a. For this reason, the court concluded that "older employees were treated less favorably than younger employees despite the fact that the actuarial value of early retirement benefits may be equal to or greater than the actuarial value" of LIB and deferred pension benefits. *Id.* at 17a. And the court found that this adverse treatment was based on age, since "retirement eligibility," the condition leading to the denial of LIB, is "inexorably linked with age." *Id.* at 19a.

The court next ruled that Westinghouse could not justify the denial of LIB by the fact that the P&I Agreement provides more valuable immediate retirement benefits to older employees. Pet. App. at 20a. It reasoned that "severance pay and pension benefits have distinctly different purposes" and, therefore, that "pension benefits [cannot be] a substitute for severance pay." *Id.* at 20a.

The court further held that "Westinghouse's severance pay and pension plans are not exempt under [§ 4(f)(2) of the ADEA]." Pet. App. at 29a. It found that the LIB and pension provisions in issue were "not integral components of a comprehensive employee benefits scheme," reiterating its earlier conclusion that "severance pay is a fringe benefit for which vested early or selected retirement benefits cannot be a substitute." *Id.* at 26a. The court also held that the challenged components of the P&I Agreement could not themselves qualify for § 4(f)(2)'s protection, since they did not "involve age-related cost factors." *Id.* at 27a.

Finally, the court reversed the district court's judgment that Westinghouse had "willfully" violated the ADEA and remanded for further proceedings. Pet. App. at 36a.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION THAT § 4(a)(1) OF THE ADEA PROHIBITS BARGAINING REPRESENTATIVES FOR EMPLOYERS AND UNIONS FROM ESTABLISHING A POST-EMPLOYMENT BENEFIT PROGRAM THAT PROVIDES RETIREMENT-ELIGIBLE EMPLOYEES WITH EITHER IMMEDIATE RETIREMENT OR SEVERANCE BENEFITS, BUT NOT BOTH, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD RESOLVE

This case presents an issue of federal law that this Court has not decided, but should decide, because of its vital importance and broad applicability to both public and private employers: that is, whether § 4(a)(1) of the ADEA prohibits an employer and its union from establishing a multi-component post-employment benefit package that provides retirement-eligible employees with either more valuable immediate retirement benefits or less valuable severance benefits, but not both, upon their termination from employment. The court below held that it

does. Because this conclusion threatens a severe disruption of settled compensation practices in this country and lacks any sound basis in the ADEA, the Court's review is necessary.

That the Third Circuit's decision effects a dramatic disruption of current benefit practices is obvious from the fact that Westinghouse's benefit program is not unique. Approximately 24 percent of the private collectively-bargained severance pay plans in this country deny severance benefits to employees if they are eligible for pensions. *See Basic Patterns: Income Maintenance*, Collective Bargaining Negot. & Cont. (BNA) No. 1144, at 53:3 (April 6, 1989); *see also Compensation: Special Pay Practices*, BNA Policy & Prac. Series No. 989, at 331:734 (March 1987) (survey of 112 responding organizations showed that "[e]mployees who retire without pension benefits and those who receive pensions upon retirement are paid severance benefits at 6 percent and 7 percent, respectively, of the firms with formal severance plans"); *Indus. Rel. Guide* (P-H) ¶ 53,458 (1986) (to prevent abuse of severance pay plans, employers often insist on certain safeguards, e.g., provisions that "[s]everance pay is not payable if an employee retires on pension"). In addition, plans with such restrictions have evolved in a wide variety of industries: indeed, the EEOC has already litigated the lawfulness of various kinds of severance and retirement benefit programs in the dairy, rubber, grocery, and steel industries;[4] it has initiated challenges to, and is currently litigating the lawfulness of, similar plans in the communications, meat packing, food, auto-

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[4] *See EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. USX Corp.*, 10 Employee Benefit Cas. (BNA) 2341 (E.D. Pa. Mar. 23, 1989); *EEOC v. Firestone Tire & Rubber Co.*, 650 F. Supp. 1561 (W.D. Tenn. 1987); *EEOC v. Babcock & Wilcox Co.*, 43 Fair Empl. Prac. Cas. (BNA) 736 (E.D.N.C. 1987); *EEOC v. Great Atlantic & Pacific Tea Co.*, 618 F. Supp. 115 (N.D. Ohio 1985).

motive, electrical and petroleum industries.[5] Thus, the Third Circuit's legal analysis, if applied generally, will destabilize negotiated benefit programs in many industries nationwide. Moreover, that analysis may likewise be used to disrupt various public sector retirement plans and programs impacting thousands of public sector employees.

Nothing in the ADEA mandates such a wholesale invalidation of these collectively-bargained benefit programs. Section 4(a)(1) of the ADEA only prohibits an employer from providing less "compensation" to an individual because of his age. *See* 29 U.S.C. § 623(a)(1). It does not prohibit an employer from providing equal or greater "compensation" to that individual through an integrated benefit package that distributes different types of benefits to different persons. And it does not single out pensions for special treatment or preclude parties from linking them to severance or other benefits in an integrated benefit package. *See, e.g., Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593 (4th Cir. 1985); *Parker v. Federal Nat'l Mortgage Ass'n*, 741 F.2d 975 (7th Cir. 1984); *Abenante v. Fulflex, Inc.*, 701 F. Supp. 296 (D.R.I. 1988), *appeal pending*, No. 87-0456-B (1st Cir.); *Khan v. Grotnes Metalforming Sys., Inc.*, 679 F. Supp. 751 (N.D. Ill. 1988).

Nor is there any reason to read into the ADEA's language, as the Third Circuit did, a limitation that Congress itself did not intend. Because benefit programs established both before and after passage of the ADEA frequently linked pension and severance benefits, Congress

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[5] *See EEOC Summary of Age Discrimination Lawsuits Filed in FY 1988, Daily Labor Report*, No. 251, at D-1 (Dec. 30, 1988); *Report on the Operations of the Office of General Counsel, Equal Employment Opportunity Commission*, October 1986 through September 1987, at Appendix C (July 11, 1988); *Report on the Operations of the Office of General Counsel, Equal Employment Opportunity Commission*, October 1985 through September 1986, at Appendix A (Mar. 31, 1987).

has had ample opportunity to invalidate integrated plans in the ADEA or in subsequent amendments. But it has not.[6] Congress has left undisturbed the numerous benefit programs that it enacted for the benefit of federal employees—programs that either deny severance benefits to, or offset those benefits against the pension benefits available to, retirement-eligible employees. *See* 5 U.S.C. § 5595(a)(2)(iv) (1983); 10 U.S.C. § 1186(b)-(c) and 10 U.S.C. § 1174(e), (h) (1983 & Supp. 1986) (officers and enlisted members eligible for voluntary retirement from active military service not entitled to separation pay); *see also* 14 U.S.C. §§ 286(b), 286a(d), and § 327(b) (1983 & Supp. 1986); 33 U.S.C. § 853h(e) (Supp. 1986). And Congress has done nothing to invalidate the well-established benefit practices—practices in which trade-offs of severance and pension benefits were common—in effect when it enacted and amended the ADEA.[7]

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[6] Indeed, the legislative history of the ADEA indicates that Congress did not want to disrupt existing employee benefit plans and that it intended generally to address problems of age discrimination in benefit plans in separate legislation. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 195-203 (1977); *see also* 113 Cong. Rec. 7076 (March 16, 1967) (Sen. Javits), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967* (1981), at 71.

[7] *See Basic Patterns: Income Maintenance*, Collective Bargaining Negot. & Cont. (BNA) No. 987, at 53:2 (March 31, 1983); *Basic Patterns: Income Maintenance*, Basic Patterns in Union Contracts (BNA), at 35 (9th ed. 1979); *Major Collective Bargaining Agreements: Severance Pay and Layoff Benefit Plans*, U.S. Dept. of Labor, Bulletin No. 1425-2, at 23 (1965); *Dismissal-Pay Provisions in Union Agreements, 1949*, 70 Monthly Lab. Rev. No. 4, at 385 (April 1950); *Employee Benefit Plans Under Collective Bargaining: Employee-Benefit Program of Consolidated Edison*, U.S. Dept. of Labor, Bulletin No. 946, at 18 (1948). Courts historically have recognized and permitted such pension/severance trade-offs both before and after the ADEA's enactment. *See, e.g., Owens v. Press Publishing Co.*, 120 A.2d 442, 446 (N.J. 1956), *citing Ackerson v. Western Union Tel. Co.*, 48 N.W.2d 338, 342 (Minn. 1951)

The Third Circuit's decision thus achieves a result that Congress carefully sought to avoid when it enacted the ADEA. By effectively precluding the exchange of pension and severance benefits within the context of a comprehensive benefit package, the decision below causes widespread disruption of benefit programs that, for decades, have integrated precisely these types of benefits. Because of the decision below, employers, unions, and plan administrators—and ultimately taxpayers where public plans are involved—now face significant potential liabilities to employees who, while receiving substantial benefits (i.e., retirement benefits), have not received all of the benefits that these integrated benefit packages provide (i.e., severance benefits). In the face of such potential liabilities, cautious and prudent employers, unions, and plan administrators, who are intensely concerned with legal certainties and lowest common-denominators, will have to alter their existing benefit programs to ensure that they can satisfy the arbitrary rule of the Third Circuit and courts that might follow it. The net effect, of course, will be fewer severance pay programs, fewer increases in pension entitlements (in order to channel the funds to severance pay and other programs), and a general mismatching of benefit payments with benefit needs. This Court's immediate review is necessary to prevent these serious, unnecessary, and counterproductive disruptions in the provision of employee benefits.

(one of the objectives of severance pay is "'partial compensation for . . . loss of possible pension rights'"); *Antonioli v. Lehigh Coal & Navigation Co.*, 451 F.2d 1171, 1178 (3d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), *Clemens v. Cent. R.R. Co.*, 399 F.2d 825, 828 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969), *Roberts v. Lehigh & New England Ry. Co.*, 323 F.2d 219, 224 (3d Cir. 1963) (in these three cases, the Third Circuit held that contracts setting mandatory retirement dates were legal and, therefore, did not unlawfully deprive employees of severance payments).

II. THE THIRD CIRCUIT'S DECISION IS IRRECONCILABLE WITH CONGRESS' AND THIS COURT'S ENDORSEMENT OF CONTRACTUAL FREEDOM IN COLLECTIVE BARGAINING

This Court's review is important for yet another reason: the Third Circuit's decision, which unraveled Westinghouse's collectively-bargained benefit program for purposes of its discrimination analysis, is at odds with this Court's traditional reluctance to interfere with the collective bargaining process. It also imposes severe restrictions on the way employers and unions negotiate collective bargaining agreements; and, more importantly, it seriously disrupts the stability of collectively-bargained retirement programs.

A. The Third Circuit's Failure To Consider The Evolution Of Westinghouse's Benefit Program Through Collective Bargaining Is Inconsistent With The Decisions Of This Court

The National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. §§ 141 *et seq.* (1982)—along with numerous public sector collective bargaining acts—imposes a duty on employers and labor organizations or their agents to bargain collectively with respect to wages, hours and other terms and conditions of employment. *See* 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d).[8] The Act's legislative history demonstrates that Congress intended to require only that parties negotiate with respect to these "mandatory" subjects. *See* 79 Cong. Rec. 7659 (1935). Congress did not intend to compel agreement. *See* 29 U.S.C. § 158(d). Thus, the NLRA permits the courts

[8] Federal public employees exercise collective bargaining rights under title VII of the Civil Service Reform Act of 1978. 5 U.S.C. §§ 7101-7135 (1982 & Supp. 1987). Many state employees also exercise statutory bargaining rights. *See, e.g.*, Fla. Stat. Ann. §§ 447.201-609 (West 1981 & Supp. 1989); Mass. Gen. Laws Ann. ch. 150E (West 1982 & Supp. 1989); *see generally Developments—Public Employment*, 97 Harv. L. Rev. 1611 (1984).

to demand participation in the collective bargaining process, but not to shape substantive solutions. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 2 (1947) ("[g]overnment decisions should not be substituted for free agreement"); S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935) ("[t]he committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms").

This Court consistently has endorsed a hands-off policy towards the results of collective bargaining negotiations. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). The Court has noted that, although the NLRA commands parties to negotiate with respect to wages, hours, and other terms and conditions of employment, the Act permits the parties lawfully to refuse to yield on these subjects (*see Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 210 (1964); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)), and, in more practical terms, to agree to yield subject to trades or concessions from the other party. This Court has declined either to interfere with such deal-making or to review its results. *See California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960).

In analyzing discrimination claims, this Court has been similarly reluctant to interfere with the bargains struck by collective bargaining partners. Thus, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977), the Court held that TWA's refusal to breach a collective bargaining agreement's seniority system to accommodate an employee's religious needs did not violate Title VII. And, in *California Brewers Ass'n v. Bryant*, 444 U.S. at 610, the Court held that a 45-week eligibility requirement for permanent employee status was lawful under Title VII because it constituted a bona fide seniority system. The Court has recognized the need to accommodate the

results of collective bargaining in other cases as well. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975) (whether employees' "substantive right[s] to be free of racial discrimination are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA"); *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 574 (1982) (§ 302(c)(5) does not authorize federal courts to review for reasonableness the provisions of a collective-bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund).

Contrary to these decisions, the Third Circuit declined to attribute any significance to the collective bargaining process that produced Westinghouse's P&I Agreement. In evaluating whether Westinghouse intentionally discriminated against older workers, the court below declined to consider that, for over two decades, Westinghouse and its unions had negotiated pension and severance benefits together as part of a total economic package. It declined to consider that, in the give-and-take of bargaining, the parties struck a balance that ensured that virtually all employees—regardless of age—received some form of post-employment income security. And it declined to consider that, in those negotiations, Westinghouse and its unions attempted to ensure that older workers fared better than their younger counterparts when their employment at Westinghouse ended.[9]

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[9] The Third Circuit's refusal to acknowledge Westinghouse's P&I Agreement as a product of collective bargaining is particularly egregious in light of its holding that Westinghouse may have "willfully" violated the ADEA. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985), this Court held that a violation of the ADEA is willful only if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." In holding that TWA did not act in "reckless disregard," the Court pointed out that the airline had obliga-

To hold, as the Third Circuit does, that Westinghouse engaged in intentional age discrimination thus denigrates the historical and legitimate bargaining that produced a benefit program that actually favors older workers. To be sure, if Congress had clearly intended to prohibit benefit programs such as Westinghouse's P&I Agreement, the fact that the program evolved through collective bargaining would serve as no justification. *See Thurston*, 469 U.S. at 121; *Corning Glass Works v. Brennan*, 417 U.S. 188, 208-10 (1974); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974). But Congress has expressed no such intent in the ADEA (*see* discussion *supra* at 8-10). Because the Third Circuit's decision thus failed without warrant to analyze Westinghouse's program in the context in which the parties negotiated it—and intended it to operate—the Court should grant review.

B. The Decision Below Interferes With The Lawful Trading Of Benefits In Collective Bargaining

The Third Circuit's decision also undermines the NLRA's vision and this Court's endorsement of free collective bargaining among competing parties. Relying on *per se* assumptions as to the nature and purposes of pension and severance benefits (*see* Pet. App. at 17a, 19a, 20a), the court below erected a blanket prohibition against exchanges or linkages of these benefits in any comprehensive benefit package. Because the NLRA does not countenance such a prohibition and, in fact, encourages flexibility in negotiations involving such benefits, the Court should review the decision below.

1. The court below ignored that, as mandatory subjects of collective bargaining, pension benefits and severance benefits are peculiarly suited to the give-and-take of collective bargaining. *See Inland Steel Co. v. NLRB*,

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tions under a collective bargaining agreement that limited its ability to focus on each provision's strict compliance with the letter of the ADEA. *Id.* at 130.

170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965). Indeed, this Court has stated that "fringe benefits . . . . have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests." *Fibreboard*, 379 U.S. at 213-14. Thus, this Court and the lower courts have ratified both pension benefits' and severance benefits' use in the trades, compromises and set-offs characteristic of collective bargaining.[19]

The status of pension and severance benefits as "cost" items only underscores their suitability to trading and compromise through collective bargaining. "[C]ollective bargaining proposals directly susceptible to monetary evaluation, such as wages, vacations, holidays, and pension and welfare contributions" are traditionally analyzed as cost items. *See* Hart, *Techniques of Collective Bargaining*, 26 Prac. Law. No. 1 9, 17 (Jan. 15, 1980); Katz, *Discussion—Do Contract Rights Vest?* Nat'l Acad. Arb. (16th) (BNA) 223, 224 (1963). As such, parties typically bargain for them within pre-set cost caps. *See Bugas, The Ford-UAW Negotiations of 1958*, Nat'l Acad. Arb. (12th) (BNA) 98, 101 (1959) ("every employee benefit has a cost, and . . . failure to control costs can

[19] Commentators have remarked on the essential role that compromises and trade-offs play in collective bargaining negotiations. *See* Ryder, *Strategy in Collective Bargaining Negotiations*, 7 Lab. L.J. No. 6 353, 358 (1956); *cf.* Cox and Dunlop, *Regulation of Collective Bargaining By The National Labor Relations Board*, 63 Harv. L. Rev. 389, 427 (1950) ("[e]xperience shows that when conflicts have arisen over pensions, merit increases, the letting of subcontracts, shift schedules, work loads and work assignments, and countless other subjects, the negotiators have exercised unlimited ingenuity in finding acceptable compromises on both substance and procedure").

make the purported benefits illusory"). And they typically bargain for these items in the context of a total economic package. M. Granof, *How to Cost Your Labor Contract* 19 (1973) ("[t]otal contract cost is one of the major restrictions established by top management").[11] As long as certain cost items remain outstanding, the entire package is subject to reshuffling through further trades, compromises or set-offs. *See D.* Rothschild, *Collective Bargaining and Labor Arbitration*, at 91; Hart, *Techniques of Collective Bargaining*, 26 Prac. Law. at 18.

Pension benefits and severance benefits, as both mandatory subjects of collective bargaining and cost items, are therefore commonly-traded items in this system of compromise. *See* discussion *supra* at 14-16. As cost items, they are necessarily related to all other cost proposals and therefore to each other. In their dual status as "cost" items and "mandatory subjects," they are susceptible to use as bargaining chips and, as such, are common subjects of deal-making. Finally, because an employer's obligation to provide pension and severance payments is often triggered by the same event—namely, employee terminations—the two benefits are most peculiarly suited to compromises and set-offs against each other. *See, e.g., Teamsters Local Union No. 688 v. NLRB*, 756 F.2d 659, 661 (8th Cir. 1985).

The Third Circuit's conclusion that these benefits cannot, under the ADEA, be so traded, disregards the lawful collective bargaining practices fomenting pension/

[11] *See also* D. Rothschild, L. Merrifield & H. Edwards, *Collective Bargaining and Labor Arbitration* 135 (2d ed. 1979), *citing* H. Davey, *Contemporary Collective Bargaining* 111-12 (2d ed. 1959) ("[u]se of the basket approach on economic issues is recommended"); Hart, *Techniques of Collective Bargaining*, 26 Prac. Law at 18 ("[p]referably, all the economic items should be presented together, with the understanding that the 'package' is a single proposal"); *Borg-Warner Corp.*, 356 U.S. at 347 ("[t]he company submitted a 'package' proposal covering economic issues").

severance linkages. Moreover, the court's hastily-concocted *per se* assumption that the two benefits serve "distinctly different purposes," Pet. App. at 20a, effectively seals pensions off from all compromise and economic pressure. No other mandatory subject of bargaining is subject to such strictures. Nor should it be. The decision below thus seriously undermines the free collective bargaining that Congress and this Court have endorsed.

2. The decision below also places an artificial, prospective restriction on the negotiating freedom traditionally afforded collective bargaining representatives. By essentially removing a major cost item—here pension benefits—from the field of potential bargaining chips, the court has severely limited the bargaining discretion of the majority-selected representative. That limitation is contrary to this Court's repeated confirmation of the wide-ranging powers of such exclusive bargaining agents (*see Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)) and its contextual approach to accommodating minority rights within the NLRA's predominantly majoritarian collective bargaining framework.

In enacting § 9(a) of the NLRA, 29 U.S.C. § 159(a), "Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Emporium Capwell Co.*, 420 U.S. at 62; *see also Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944). While this Court historically has sought to preserve bargaining unit members' collective strength, it has, concomitantly, imposed on exclusive bargaining representatives an obligation to serve the interests of all unit members without hostility or discrimination toward any, to exercise their discretion with complete good faith and honesty, and to avoid arbitrary conduct. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

The Court traditionally has interpreted this "duty of fair representation" in a manner that protects minority interests. It has done so, however, without ignoring the practical constraints of collective negotiations or the necessity for binding majority rule. The Court has stated that "[a]ny authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in light of all relevant considerations, they believe will best serve the interests of the parties represented." *Huffman*, 345 U.S. at 337-38. Thus, the Court has recognized that "differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees" (*id.* at 338), but has refused to "find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents . . . [or] in supporting the position of one group of employees against that of another." *Humphrey*, 375 U.S. at 349.

The decisions of the lower federal courts illustrate the extent to which bargaining representatives can enjoy significant negotiating freedom as to employee benefits without violating their duties of fair representation. In *Chesser v. Babcock & Wilcox*, 753 F.2d 1570, 1573 (11th Cir.), *cert. denied sub nom. Sims v. Babcock & Wilcox Co.*, 474 U.S. 836 (1985), for example, the Eleventh Circuit held that a union was not required to insist on extra pension benefits for certain employees at the expense of frustrating the desires of a majority of the members for severance pay. Other federal courts have upheld similar bargains against duty of fair representation challenges. *See Hendricks v. Airline Pilots Ass'n, Int'l*, 696 F.2d 673, 677 (9th Cir. 1983) (no breach of duty of fair representation when union confiscated one group's right to exchange vacation days for compensation in favor of and directly to the economic benefit of another group subject

to a potential layoff); *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1330 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981) (law of fair representation clearly permits a union to negotiate for an agreed-to contract provision awarding greater benefits to fully registered workers than to provisional workers); *Buchholtz v. Swift & Co.*, 609 F.2d 317, 319 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980) (no breach of duty of fair representation when union withdrew vacation pay claim of some former employees in order to obtain pension benefits for others).

The Third Circuit's decision stands in direct contrast to these courts' careful balancing of individual and collective rights and places a prior restraint on the negotiating freedom of collective bargaining representatives. The Third Circuit's decision effectively forecloses a union representative from agreeing to any integrated benefits program involving a trade-off of pension and severance benefits (or, for that matter, pensions and any other benefit). It does so regardless of the plan's history, the industry involved, the employee interests at stake, or the representative's motives for negotiating such a plan. Such a prospective limitation is in serious tension with the NLRA's exclusive representation scheme.

It is also in serious tension with the purposes underlying the ADEA. One of the ADEA's express purposes is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The legislative history makes clear that, in formulating this purpose, Congress recognized that older and younger workers have different qualifications and face different pre- and post-employment problems. *See generally The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), reprinted in EEOC Legislative History of the Age Discrimination in Employment*

Act of 1967 (1981), at 11-17. It thus intended to encourage, rather than discourage, employers and the representatives of their employees to work out solutions to these different problems and to implement programs tailored to the special needs of older and younger workers. Because the Third Circuit's decision invalidates precisely such a program—one that Westinghouse and its unions designed to address the special post-employment needs of older workers—and therefore contravenes one of the ADEA's express purposes, this Court should grant review.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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No. 88-1770

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Where an employer has long maintained a collectively bargained program of benefits for former employees which treats older employees more favorably than younger employees, may a court dissect the total program into parts and hold that one part, isolated from the remainder, discriminates against older employees under § 4(a)(1) of the Age Discrimination in Employment Act of 1967 (ADEA).

2. Whether a plan that exists and pays benefits fails to qualify as a "bona fide employee benefit plan" within the meaning of § 4(f)(2) of the ADEA because it lacks age-related cost factors; this same question is now pending before the Court in *Public Employees Retirement System v. Betts*, No. 88-389.

3. Whether an employer whose conduct at the time was not contrary to the law as then pronounced and applied by other federal courts may be held in "willful" violation of the ADEA.

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC), with the written consent of the parties, respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari filed in this case by Westinghouse Electric Company. The written consents of all parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a

broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1984, as amended, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, virtually all of EEAC's members and member constituencies maintain employee benefit plans for their employees over and above normal wages and salaries. Of these, a significant number are integrated benefit plans which provide a coordinated benefit "package," often the product of collective bargaining with employee representatives.

As potential respondents to charges of discrimination pursuant to the ADEA and Title VII, EEAC's members are interested in the extent to which individual elements of these benefit packages may be attacked as discriminatory notwithstanding the exception for bona fide benefit plans set forth in § 4(f)(2) of the ADEA.

Thus, the issues presented in the petition are extremely important to the nationwide constituency which EEAC represents. In this case, a collective bargaining agreement with the Union provided that

eligible employees had the option of receiving one of two post-employment benefits: immediate retirement benefits or severance and deferred retirement benefits. The court below held that eligible employees should have received both benefits and that denial of severance pay to persons who elected to receive immediate retirement benefits violated the ADEA, even "accepting Westinghouse's contention that the value of early retirement benefits is actuarially greater than or equal to the value of [severance benefits] plus a deferred pension. . . ." Pet. App. 16a.[1]

Moreover, the Third Circuit held that the Westinghouse post-employment income system was not an "employee benefit plan" under § 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2). Rather, the court isolated the severance portion of the system, labeled it a "fringe benefit," and concluded it was not an integral component of a comprehensive employee benefits system. *Id.* at 26a.

EEAC's members are concerned about the potential effect of the Third Circuit's holding on innumerable coordinated employee benefit plans. In many contexts, and for many years, EEAC members have sought to provide for their employees integrated packages of fringe benefits designed to provide for their needs over and above wages or salary and to be consistent with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* Many of these employers have planned to provide post-employment income, particularly in the event of a plant closing, to guarantee their longest-

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[1] "Pet. App." references are to the appendix to Westinghouse's petition for a writ of certiorari.

working employees a continual stream of income until death as well as a "safety net" in the event of involuntary termination without fault.

In these situations, the responsible employer will attempt to provide benefits to the greatest number of employees, with due regard to the amount of available funds. Under the decision below, however, a benefit can be held to be age-discriminatory merely because older employees receive this continued income as part of a retirement program rather than through a severance package designed for workers not eligible for retirement. However, if older workers must receive the greatest benefits under each portion of a package dissected into its component parts, a considerable number of established, and often collectively bargained, benefit plans will fail, and in many cases, some of the benefits will be eliminated because of greatly increased, and unanticipated, costs.

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 250 briefs as *amicus curiae* in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated in several cases involving application of the ADEA to retirement and severance pay plans, including *Public Employees Retirement System v. Betts*, No. 88-389 (U.S. argued March 28, 1989); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); and *Abenate and Equal Employment Opportunity Commission v. Fulflex, Inc.*, Nos. 89-1179, 89-1180 (1st

Cir.) (Severance pay offset by present value of lifetime pension benefit).[2]

STATEMENT OF THE CASE

The facts of this complicated case are described more fully in Westinghouse's petition and in the opinion of the Third Circuit. Set out below, however, are the holdings of the court below that highlight the general importance of this case beyond the interests of the particular parties.

This case does *not* involve an employer flush with cash in the midst of an economic boom. Rather, as occurred all too frequently in the past decade, Westinghouse was faced with the necessity of closing a plant and laying off employees. The possibility of economic extremis, however, had been anticipated twenty years earlier and provided for through a series of agreements between Westinghouse and the union representing its employees.

Through this ongoing series of agreements, the company and union adopted and refined a post-employment income system for a large number of employees—those eligible for immediate pension payments, severance pay, or both. Beginning in 1960, these agreements provided that those eligible for retirement would receive their post-employment compensation through the retirement system. Those not

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[2] Furthermore, a number of the other cases in which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Harbison-Walker Refractories v. Brieck, cert. dismissed*, 109 S. Ct. 546 (1988); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). *See also McLaughlin v. Richland Shoe Co.*, 108 S.Ct. 1677 (1988) (standard for willful violations under the FLSA, Equal Pay Act and ADEA).

eligible to participate in the retirement system would receive their post-employment payments by way of severance benefits. Over time, the retirement-eligible pool of employees was expanded, and the age and service requirements applicable to the plant closure situation were reduced.

Initially, those eligible for retirement did not have the choice of receiving severance pay as an alternative. In 1982, the program was revised to give those eligible for early retirement the *option* of receiving either immediate retirement benefits or a lump-sum payment of separation benefits. (Pet. App. 12a.)

Those who chose not to sever their relationship with the company would receive additional pension and insurance benefits including: a lifetime pension; a supplemental monthly payment for each year of credited service until eligible for Social Security payments; the opportunity to provide continued benefits to a spouse or other person in the event of death; continuation of life insurance; continuation of medical coverage until eligible for Medicare; and continuation of dependent insurance. (Pet. App. 12a-13a.)

The Third Circuit held that even accepting Westinghouse's contention that the value of early retirement benefits is greater than or equal to the value of severance pay plus a deferred pension, because pension eligibility was the determinative factor, retirement-eligible employees were treated less fairly "based on age" than were workers who received severance pay plus deferred pensions. (Pet. App. 16a-17a.)[3]

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[3] The Third Circuit noted that its holding on this point was contrary to *Parker v. Federal Nat'l Mortgage Ass'n.*, 741

Interestingly, when Westinghouse later raised the defense that its post-employment compensation program was based on age-related cost factors, the Third Circuit took the opposite tack and stated that "other courts have recognized that a plan based on length of service and salary is not necessarily based on age." (*Id.* at 28a-29a and cases cited.)

Further, although retirees received these post-employment benefits through the retirement plan, the Third Circuit rejected Westinghouse's arguments that this was a comprehensive and integrated benefits program. (*Id.* at 19a-24a.) Instead, the court made the following distinction:

> Under those plans, severance pay and pension benefits have distinctly different purposes. Severance pay was a short-term fringe benefit, to provide financial assistance during the adjustment period immediately following layoff; pension benefits were long-term retirement benefits. The district court concluded that pension benefits are not a substitute for severance pay. We agree.

Id. at 20a. Thus, because the severance benefits were not merged into the pension plan, the Third Circuit held that Westinghouse's system was not an "employee benefit plan" protected by Section 4(f)(2) of the Act. *Id.* at 20a-21a.

The Court then remanded the case to the district court to determine whether Westinghouse had committed a "willful" violation of the statute. (Pet. App.

F.2d 975 (7th Cir. 1984) ("To the extent that the court [in *Parker*] held that an option policy like Westinghouse's does not violate the ADEA, *we decline to follow it.*"). Pet. App. 24a-25a) (emphasis added).

29a-36a.) If willfulness is found, Westinghouse faces double damages under the ADEA.

REASONS FOR GRANTING THE WRIT

BECAUSE THE THIRD CIRCUIT'S ANALYSIS IS CONTRARY TO THE ADEA, ERISA AND DECISIONS IN OTHER CIRCUITS, BENEFITS PLANNERS NEED THIS COURT'S GUIDANCE TO RESOLVE THE CONFUSION CREATED IN THIS CASE. WITHOUT SUCH GUIDANCE, MANY POST-EMPLOYMENT INCOME PLANS DESIGNED TO PROVIDE AN INCOME STREAM TO THE LARGEST POSSIBLE NUMBER OF FORMER EMPLOYEES WILL BE THREATENED.

A. By Requiring That Retirement-Eligible Persons Receive Any Post-Employment Payments Made To Others, The Decision Below Is At Odds With Common Practice And Jeopardizes Existing Levels Of Early Retirement And Severance Payments

Post-retirement systems like the one in this case are common in American industry. Among the Fortune 200 companies—most of which are EEAC's members—are numerous companies from various industries (including steel, electronics, auto, oil, rubber, telecommunications, canning, and meatpacking) that are directly affected by the decision below. This effect extends far beyond the Third Circuit, as the Equal Employment Opportunity Commission, private plaintiffs and the American Association of Retired Persons (AARP) are using the decision below to bring or support ADEA actions in other post-employment cases as well.[4]

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[4] *See, e.g.*, the briefs of the EEOC and AARP in *Abenate and EEOC v. Fulflex, Inc.*, Nos. 89-1179 and 89-1180 (1st Cir.); and EEOC Summary of Age Discrimination Lawsuits Filed in Fiscal Year 1988, No. 251 Daily Labor Report (BNA) at D-1 to D-5 (December 30, 1988).

A distinction that often is missed in these cases is that the post-employment system *does not jeopardize vested retirement benefits already earned.* Those benefits are protected by ERISA and cannot be taken away. Rather, these cases involve employer policies designed to protect employees from the economic impact of layoffs where jobs are being consolidated or eliminated. They involve employer policies that go beyond any legal requirement and provide a post-employment flow of income to those employees affected by the business downturn. Both special early retirement pensions and severance payments are designed to protect employees against *ad hoc* contingencies which may or may not occur, such as plant closings or reductions in force.

Many companies, like Westinghouse, establish their post-employment retirement and severance policies at the same time and maintain them on an ongoing basis. Others are prompted by unforeseen economic downturns to establish severance plans for persons not previously covered, or to extend coverage where appropriate. Often, when an industry experiences a downturn and layoffs are necessary, economic circumstances make it exceedingly difficult for many employers to pay any and all severance payments to those who have previously been covered by enhanced post-employment pension benefits.

Under the view of the Third Circuit and the EEOC, those extra payments also must be made to retirement-eligible workers who have already been provided an equivalent or more valuable post-employment income package. This approach poses a great risk for the continued use of such programs at their present level. As one court has explained:

> . . . EEOC's position causes no little concern for the plight of employees subject to layoff in the future. Since layoffs are usually the result of employers cost-cutting measures in years of economic decline, [*an employer*] *may simply decide that it cannot afford both the present rate of pensions plus severance and terminate all severance pay.*

EEOC v. USX Corp., 10 EBC 2341, 2350 n. 15 (E.D. Pa. 1989) (emphasis added).

Given the uncertainty created by the decision below, plus the possibility that such programs may be found to be a "willful" violation subject to liquidated double damages (Pet. App. 29a-36a), review by this Court is essential to provide much-needed guidance for employers and agency officials who may prosecute them.

B. The Effect Of The Decision Below Will Be Widespread, As Integrated Benefit Plans Permitted By ERISA Are A Common Method Of Providing Post-Employment Income Benefits.

Most employers, either unilaterally or through collective bargaining, offer their employees benefits in addition to wages or salary. These valuable benefits can include life and health insurance, disability income, sick leave, paid vacations, and post-employment income. Perhaps the most common benefit is a retirement pension, a lifetime income generally provided to employees who have satisfied minimum service requirements and attained retirement age.[5] In

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[5] According to a recent survey of workers over 40, 77% of employees surveyed said that they were covered by a pension plan offered by their current employer. American Association of Retired Persons, *Work and Retirement: Employees Over 40 and Their Views* at 13 (1986).

addition, many employers have elected to provide a lesser benefit, known as "separation" or "severance" pay, to employees who lack the eligibility requirements for a pension.

Westinghouse agreed, through the collective bargaining process, to provide pension benefits for eligible employees and severance pay to those who could not qualify for a pension. This design is fairly typical. A full forty percent of collectively bargained plans which restrict receipt of benefits deny severance pay to pension-eligible employees. *See Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts* (BNA) No. 1144 at 53:4 (April 6, 1989).

Significantly, Congress has integrated pension and severance benefits for federal employees. Retirement-eligible civil service employees do not receive severance pay, 5 U.S.C. § 5595(a)(2)(B)(iv),[6] nor do members of the armed forces. 10 U.S.C. § 1186 (voluntary retirement); 10 U.S.C. § 1174(e) (involuntary discharge or release). Similarly, severance payments received are deducted from pension payments to a regular warrant officer of the Coast Guard, 14 U.S.C. § 286a(d), or an officer of the National Oceanic and Atmospheric Administration. 33 U.S.C. § 853h(e).

The purpose underlying this practice is self-evident. Employers have a limited amount of funds to provide post-employment income benefits. Quite naturally, they wish to allocate more resources to

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[6] Importantly, 5 U.S.C. § 5595, Pub.L. 90-83 (September 11, 1967), 81 Stat. 201, was enacted by the same session of Congress that enacted the ADEA, Pub.L. 90-202 (December 15, 1967).

employees with longer service to the company, yet at the same time provide some benefit to those with less service. Pension payments and severance pay serve essentially the same function—to provide income to employees after employment has terminated. Thus, in an integrated benefit plan, every employee earns credits towards some form of income replacement at termination. If the employee remains with the company long enough to attain the minimum age and service requirements for a pension, the post-employment income benefit takes the form of a lifetime income through the retirement system. If not, the employee is only entitled to a severance payment, which, by definition, cannot be paid through the retirement system.

Integration of pensions with other benefits is a well-recognized method of fairly providing post-employment income to employees. As the Supreme Court observed in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), holding that ERISA does not prohibit the deduction of workers' compensation payments from pension benefits, "integration" is:

> a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees.

451 U.S. at 514. Numerous federal courts have upheld various forms of benefit integration under ERISA.[7]

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[7] *See, e.g., Spitzler v. New York Post Corporation*, 620 F.2d 19 (2d Cir. 1980) (deduction of present value of pension

C. The Decision Below Is At Odds With The Decisions Of Other Courts And Is Based Upon A Fundamental Misconception That Isolates Severance Benefits From An Integrated Post-Employment Income System.

In this case, Westinghouse negotiated with the union a comprehensive, post-employment compensation system which provided that retirement-eligible individuals would receive their future benefits through the retirement system. But it also attempted to provide some post-employment severance income to those employees who were not eligible for retirement.

Those severance payments, of course, could not be paid through the retirement system, nor would there be any reason to establish an ongoing relationship with former employees who were laid off with no prospect for future employment. Thus, those employees received severance pay in the form of a lump sum payment. Retirement-eligible employees had the option of receiving their post-employment income either through the retirement system (along with other valuable benefits) or through a lump sum payment for severance pay. The fundamental flaw in the Third Circuit's decision is that it myopically viewed the severance pay plan as an independent benefit. Because that approach ignored the realities

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account from severance pay calculation does not violate ERISA); *Leary v. Western Union Telegraph Company*, 570 F. Supp. 1384 (S.D.N.Y. 1983) (same). *See also Vintilla v. U.S. Steel Corp. Plan for Employee Pension Benefits*, 606 F. Supp. 640 (W.D. Pa. 1985), *aff'd without opinion*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 475 U.S. 1141 (1986) (pension plan did not violate ERISA by setting off severance benefits paid pursuant to Venezuelan law).

of employee benefit plans, it should be reversed by this Court.

The Third Circuit refused to consider any possibility that pension and severance benefits were part of a single integrated benefit package. The entire decision turns on the court's unsupported conclusion that:

> [Plaintiffs] had vested rights to their retirement benefits independent of Westinghouse's policy on severance pay. It is therefore inappropriate to characterize retirement benefits as a more valuable substitute for severance pay. Any right to severance pay was in addition to, not a part of, the preexisting vested right to retirement benefits.

(Pet. App. 16a-17a). The clear language of the statute, however, does not require such an interpretation. Instead, where a challenged policy is not a "free standing element," it should not be evaluated in a vacuum, but in the context of the complete policy of which it is a part. *See Arnold v. Postal Service*, 863 F.2d 994 (D.C. Cir. 1988) (Postal Service policy requiring transfer of inspectors with greatest seniority to major metropolitan offices must be viewed in light of entire transfer policy and thus did not violate ADEA).

Moreover, the court offered neither explanation nor justification for its startling opinion that the fact that retirement payments had vested required the payment of severance pay to pension-eligible persons who were laid off. Whether or not employees had a "vested" right to retirement benefits is irrelevant to a determination of whether those benefits were offered in coordination with an integrated benefit package. Even if such benefits were "vested" under

the provisions of ERISA, it does not follow that these benefits must be viewed in a vacuum, or that the employee also is entitled to a similar post-employment benefit paid to employees who are not yet eligible for retirement. Accordingly, the court's statement that the right to severance pay was not a part of a preexisting right to pension benefits does not characterize accurately the nature of the beenfits offered.

Any employer which contemplates providing one or more fringe benefits to its employees must necessarily consider the benefits, if any, already in place, and the cost of those benefits, together with the cost of any new benefits under consideration. In order, fairly and efficiently, to provide maximum benefits at reasonable cost, a responsible employer will ensure that benefits with similar purposes coordinate with and complement each other, instead of overlapping in some cases and failing to provide adequate benefits in others. This approach creates an integrated "benefit package" which serves the entire work force.

As noted more fully in part B above, the "integrated benefit plan" is well established both in fact and in law. Nevertheless, the Third Circuit inexplicably chose to ignore this reality. In fact, the Third Circuit's decision conflicts with a number of decisions in other circuits involving an interrelationship between pensions and severance pay. Indeed, the court below acknowledged this split and refused to follow the Seventh Circuit's decison in *Parker v. Federal National Mortgage Association*, 741 F.2d 975 (7th Cir. 1984). *See* footnote 3, above. In another circuit split, the Fourth Circuit upheld a plan requiring deferral of pension benefits during receipt of

severance pay in *Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593 (4th Cir. 1985). Several district courts have approved similar structures. *See, e.g., Khan v. Grotnes Metalforming Systems, Inc.*, 679 F. Supp. 751 (N.D. Ill. 1988) (severance pay deducted from pension benefits); *EEOC v. Firestone Tire & Rubber Co.*, 650 F. Supp. 1561 (W.D. Tenn. 1987) ("severance" award was actually minimum pension distribution).[8] In fact, one district court in the Third Circuit has observed that it would have upheld a plan coordinating pension and severance pay had it not felt obligated to follow the Third Circuit. *See EEOC v. USX Corporation*, 10 EBC 2341, 2347 (E.D. Pa. 1989).

In all of these cases, the employer provided a post-employment income payment system designed to substitute for wages earned through working. The payment was made either through the pension system (for retirement-eligible employees) or by way of severance pay for others. The validity of post-employment income programs has been jeopardized by the decision below. Millions of dollars of benefits are at stake. Thus, we strongly urge the Court to review this case and clarify issues of utmost importance to employees, employers and the enforcement of the ADEA.

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[8] *Cf. EEOC v. Curtiss-Wright Corp.*, 40 FEP Cases 666 (D.N.J. 1982) (while pension-eligible employees cannot be denied severance pay, pension should only be payable after severance pay is exhausted).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the amicus, EEAC, respectfully urges the Court to grant the petition herein on all three issues raised in Westinghouse's petition.

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IN THE

Supreme Court of the United States

October Term, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS TO BE CONSIDERED

I. The petition for a writ of *certiorari* should be granted to enable this Court to determine whether disparate impact analysis is appropriate in an ADEA action.

II. The petition for a writ of *certiorari* should be granted to enable this Court to clarify the standard of proof required to establish a willful violation of ADEA.

III. The petition for a writ of *certiorari* should be granted to determine whether an employer must show age-related cost factors in order to establish a 4(f)(2) defense under ADEA, and to clarify the grounds on which a finding of subterfuge may properly be based.

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No. 88-1770

IN THE

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WESTINGHOUSE ELECTRIC CORPORATION,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Defense Research Institute, Inc. has obtained the consent of the attorney for the petitioner and the attorney for the respondent to file this brief *amicus curiae*. Letters of consent from both parties are on file with this Court.

The Defense Research Institute, Inc. ("DRI") is a national organization comprised of approximately 15,000 defense trial lawyers, corporate and insurance counsel. DRI was established in 1961 to improve the skills and further the goals of defense counsel through participation in the legislative and judicial process. The organization has a vigorous employment law committee, whose members actively conduct seminars and contribute to publications in the employment law area, in addition to trying cases and advising their clients.

The interest of DRI in this case arises from several factors. First, this case presents an opportunity for the Court to rule on the major unsettled area of the Age Discrimination in Employment Act, as amended, 29 U.S.C. §621 *et seq.* (1982) ("ADEA")—whether the "disparate impact" theory developed by this Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* (1964) ("Title VII"), in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), applies in ADEA cases. The major differences between ADEA and Title VII cases, including jury trials, variable class boundaries and unique statutory defenses, significantly affect defense counsel in preparing cases and advising clients.

Second, the standards for establishing willfulness under ADEA require attention so as to clarify the role of counsel in litigation work and client counseling. Since this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (hereinafter "*Thurston*"), the lower courts have adopted surprisingly inconsistent

standards. In this case, not only did counsel for Westinghouse advise Westinghouse that its plan was legal, and with certain changes would be effectively ironclad, but counsel for the EEOC in other similar litigation advised Westinghouse that the plan would be legal if the changes were made. Despite this reliance upon both its own and opposing counsel's opinions, Westinghouse is now subjected to the risk of liability for liquidated damages based upon the lower court's finding of a willful ADEA violation. From the viewpoint of counsel engaged in litigation, such a result is unacceptable. Effective and efficient conduct of litigation often involves attempts to move parties towards a position of compromise, perhaps on the entire case or perhaps on one or two issues. Such movement, in turn, depends upon an understanding of what the other party is seeking—an understanding that may properly come only from that party's lawyer. It is destructive to the process of settlement, and thus to the judicial system in its entirety, to subject a party to enhanced liability to another party for acting in reliance upon assurances provided by that other party's lawyers.

Third, a large number of employers have attempted to provide their employees with protections from economic dislocations through such devices as severance pay plans, retirement plans, sickness and accident plans and the like. In a competitive economy, it is important to maximize the overall benefit of these plans in a coordinated fashion so that one group of employees will not receive a disproportionately high share of the limited resources available at the expense of other groups. The impact of the decision below will be to give just such a windfall to retirement-eligible employees. In the longer term, the result will be to discourage employers from creating or expanding such benefit programs.

REASONS FOR GRANTING THE WRIT

I. The petition for a writ of *certiorari* should be granted to enable this Court to determine whether disparate impact analysis is appropriate in an ADEA action.

This Court has never resolved the issue of whether disparate impact analysis, which was developed in cases arising under Title VII, is applicable to an action based upon ADEA. *Markham v. Geller,* 451 U.S. 945, 947-48 (1981) (Rehnquist, *J.*, dissenting from denial of *certiorari*). The lower courts have generally assumed that disparate impact analysis can be transplanted into an ADEA action without performing an adequate analysis to determine whether the legislative history and statutory framework of ADEA justify this extension of Title VII jurisprudence. The petition should be granted in this case to enable the Court to resolve this critical issue, and to deal with the ever-increasing number of decisions in which courts have cavalierly imported disparate impact analysis into ADEA cases based on faulty and incomplete analyses.

Several courts have mistakenly assumed that this Court authorized disparate impact analysis in an ADEA action by its decision in *Thurston. See, e.g., Lindsey v. American Cast Iron Pipe Co.,* 810 F.2d 1094 (11th Cir 1987). In *Thurston,* however, the challenged policy of TWA was expressly based upon age, and the plaintiffs introduced that policy as direct evidence of intentional age discrimination. Since the policy at issue in *Thurston* was not facially neutral, this Court was not presented with an opportunity to determine the applicability of disparate impact analysis.

Other courts have also failed to recognize that an age-based employment policy, which, by definition, treats employees differently on account of their age, presents an issue of disparate treatment rather than

disparate impact. As a result, courts have approved disparate impact analysis in cases that, when properly understood, only present a disparate treatment question, because there is no facially neutral policy at issue. *See Popko v. City of Clairton*, 570 F. Supp. 446, 451 (W.D. Pa. 1983). These decisions have subsequently been relied on without analysis by other courts as authority for the application of disparate impact analysis in an ADEA action. *See, e.g., Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427-28 (7th Cir. 1986); *Reilly v. Prudential Property & Casualty Ins. Co.*, 653 F. Supp. 725 (D.N.J. 1987).

Still other courts have applied disparate impact analysis in ADEA actions without any analysis of whether such application is appropriate outside the special context of Title VII. *See, e.g., Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *Cotton v. City of Alameda*, 812 F.2d 1245 (9th Cir. 1987); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985) (hybrid case presenting both disparate treatment and disparate impact claims). These decisions have, in turn, been relied upon by other courts. *See, e.g., Monroe v. United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985) (hybrid case presenting both disparate treatment and disparate impact claims).

In short, while the majority of lower federal courts that have addressed this issue have concluded that disparate impact analysis is appropriate in an ADEA action, many of these decisions have been based on a failure to properly distinguish disparate treatment and disparate impact issues. The decisions that have addressed the issue of whether disparate impact analysis is appropriate in an ADEA action have generally engaged in superficial analyses of the general similarities

between the statutes, and concluded that the substantive provisions of ADEA are sufficiently similar to those of Title VII to warrant the extension of disparate impact analysis to ADEA actions. *See, e.g., Geller v. Markham,* 635 F.2d 1027 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981); *EEOC v. Borden's, Inc.,* 724 F.2d 1390, 1394 (9th Cir. 1984); *EEOC v. Governor Mifflin School District,* 623 F. Supp. 734 (E.D. Pa. 1985).

What each of these cases fails to recognize is that there are significant differences between the two statutes, reflecting the more limited intentions of Congress with respect to circumscribing the right of an employer to make employment decisions based upon the age of an employee. When Congress enacted ADEA, it recognized that there are more circumstances in which an employer should be permitted to make employment decisions based on age than there are circumstances in which an employer should be permitted to make employment decisions based on race, sex, religious affiliation or national origin. Once these differences are recognized, the case for going beyond protecting employees treated differently due to their age to prohibiting use of neutral criteria that have some effect correlated with age is significantly diminished.

First, the societal premise upon which disparate impact analysis was formulated in the Title VII context is simply not present in ADEA actions. In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), this Court developed disparate impact theory in order to prevent pervasive societal discrimination in one arena (education) from posing a barrier to opportunity in another arena (employment). In so doing, the Court took judicial notice of the "built in headwind" against which the plaintiffs struggled, due to the inferior education they had received in North Carolina schools. Since Title VII was part of a broad social remedial scheme, the Court found it appropriate to adopt a legal theory that precluded an

employer from compounding the disadvantage of pervasive societal discrimination by otherwise neutral employment policies.

The goals of ADEA, on the other hand, were much more modest. The legislative history of ADEA indicates that Congress was acting upon reports that found that older persons simply did not encounter the same discriminatory animus that was levelled against the groups protected by Title VII. *See* U.S. Dept. of Labor, Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 ("Wirtz Report"), contained in *Legislative History of the Age Discrimination in Employment Act* (U.S. Government Printing Office, 1981).

This Court has similarly distinguished between classifications based upon age and classifications based upon race, sex, and national origin for purposes of equal protection analysis. In *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), this Court stated that persons over the age of 40:

> unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [Older persons are not a] 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian process.' Instead, it marks a stage that each of us will reach if we live out our normal span.

Id. at 313-14.

In short, the problem of perpetuating past societal discrimination that the Court was concerned with in *Griggs* is absent in age cases. Since older persons have not experienced the history of purposeful discrimination that was present in the Title VII context, there is no pressing need to remedy the effects of societal discrimination that would justify the judicial invalidation of facially neutral employment policies in age cases.

Another premise of disparate impact analysis that is lacking in ADEA cases is the proposition that disparate impact will work no significant hardship upon the employer's business. It is frequently observed in Title VII cases that race, sex, etc. bear no demonstrable relation to an employee's performance, productivity, or the cost of their employment, and thus it should not affect the employer's business if the employer is precluded from making employment decisions based upon those criteria.

Age, on the other hand, is clearly at some point going to affect an employee's productivity and performance. *Vance v. Bradley*, 440 U.S. 93, 121 (1979); Wirtz Report, *supra*, at 5-6. Age is also cost-related, since older employees are more likely to be entitled to higher wages on the basis of their seniority and experience, the cost of their insurance and benefit programs is likely to be higher than that of younger workers and, in some cases, the employer will incur additional costs due to the diminished productive capacity of an older worker resulting from reduced ability or physical impairments. *See*, Note, *The Cost of Growing Old: Business Necessity and the ADEA*, 88 Yale L.J. 565 (1979).

Awareness of these factors prompted Congress to limit the scope of ADEA liability; it should also militate caution in the application of disparate impact analysis to ADEA cases. It is widely recognized that disparate impact analysis is potentially the broadest sweeping liability doctrine in discrimination law, due to its emphasis on discriminatory effects rather than discriminatory intentions. This Court itself has repeatedly refused to apply disparate impact analysis to discrimination cases arising outside the context of Title VII. *See, e.g., Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 584, n.2 (1983); *General Bldg Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-91 (1982); *Personnel Admin'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

In addition, since age is not an immutable characteristic and the protected age group can be divided into subgroups, the class of employees who may be adversely affected by an employer's policies can fairly be said to present a "moving target." It is easier for a plaintiff to establish a *prima facie* case under ADEA by manipulating the composition of the alleged class (*i.e.*, challenging a policy on the grounds that it adversely affects employees between the ages of 40 and 50, 40 and 70, 55 and 65, over 70, etc.) than under Title VII, where the class is "immutable" and cannot be regrouped. Likewise, it is more difficult for an employer to devise and test policies and programs that will not adversely affect some conceivable subset of older employees than it is for the employer to ensure that none of its programs or policies adversely affects women, blacks, or other groups protected by Title VII.

Finally, and perhaps most importantly, the express language of Section 4(f)(1) of ADEA, which immunizes employers from liability for different treatment based on reasonable factors other than age ("RFOA's"), has no counterpart in Title VII and precludes the very principle of disparate impact claims. Since disparate impact claims, as noted above, are by definition directed against factors other than the prohibited criteria, reliance upon those facially neutral criteria is specifically protected by the RFOA exemption. The legislative history of the RFOA exemption indicates that Congress considered test results (which are the classic example of facially neutral criteria causing a disparate impact under *Griggs*) to be an example of an RFOA. 113 Cong. Rec. 31253 (Section by Section Analysis, remarks of Senator Yarborough, Nov. 6, 1967).

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court construed language in the Equal Pay Act similar to the RFOA exemption ("a factor other than sex"), 29 U.S.C. §206(d), as precluding disparate impact analysis, and limiting the application of the Equal Pay

Act to "wage differentials attributable to [intentional] sex discrimination." *Id.* at 170. This Court should conclude that the language of ADEA similarly precludes the application of disparate impact analysis in ADEA cases. This would have the effect of permitting an employer to employ non-age-based criteria (such as "cost," "no double-dipping" or "experience level") so long as those criteria are not proxies for age, are not promulgated with an intent to discriminate and are not subterfuges to evade the purposes of the Act.

In sum, the application of disparate impact analysis to ADEA actions represents an unwarranted importation of judge-made law from the Title VII context to ADEA. In light of the different language, legislative and social history, and policy considerations of these two statutes, such an application should be rejected by this Court. Taking that action is a matter of substantial importance given the increasing number of ADEA cases alleging some disparate impact of any number of facially neutral employment policies.

II. The petition for a writ of *certiorari* should be granted to enable this Court to clarify the standard of proof required to establish a willful violation of ADEA.

In *Thurston*, this Court approved a definition of "willfulness" under ADEA that required a plaintiff to show that the defendant either knew that, or showed reckless disregard for the matter of whether its conduct was prohibited by ADEA. *Id.* at 128-29. This Court concluded that TWA was not liable for a willful violation, although it had maintained an illegal transfer policy, because (1) there was no evidence tending to show that TWA had ever been advised by counsel that its policy discriminated on the basis of age, *id.* at 129; (2) the transfer policy was established pursuant to TWA's efforts to bring its retirement policies in line with

ADEA; and (3) it was reasonable to conclude that TWA had simply overlooked the way the policy worked when applied to its pilots. *Id.* at 130.

Since *Thurston*, the lower courts have continued to grapple with the quantum of proof required to establish a willful ADEA violation. Further clarification of this issue is of importance to defense counsel for several reasons. First, like the Fair Labor Standards Act, 29 U.S.C. §216, ADEA provides for an award of liquidated damages in an amount double the plaintiff's actual loss upon proof of a willful violation. Second, as this Court recently held in *McLaughlin v. Richland Shoe Co.*, _____ U.S. _____, 108 S. Ct. 1677 (1988), the statute of limitations is extended in cases involving a willful violation from two years to three years. Third, because of the confused state of the case law, defense counsel cannot provide advice to clients as to whether or not such conduct as consulting with a private attorney and obtaining assurances from counsel for the opposing party will protect those clients from a finding that their conduct is willful under ADEA. *Certiorari* should be granted in this case both to resolve the exceedingly confused state of the law, and to correct the plain error of the court below on this issue, since Westinghouse's conduct could not possibly be found to have been willful under the standard established by *Thurston*.

Since *Thurston*, the lower courts have issued wildly inconsistent rulings as to what is necessary to establish a willful violation of ADEA. The Second Circuit recently held that liquidated damages may be awarded when the employer is indifferent to the requirements of ADEA, and acts in a purposeful, deliberate or calculated fashion. *Benjamin v. United Merchants & Mfgrs. Inc.*, _____ F.2d _____, 49 F.E.P. Cases 1020 (2d Cir. 4/19/89). The court stated that liquidated damages would not be awarded when the employer only acts negligently, inadvertently or innocently, or even where the employer is aware of the applicability of ADEA but acts

reasonably and in good faith. The court suggested that these cases should be understood by reference to a continuum, and that resolution of those cases falling in the middle of the spectrum would turn on the fact finding and credibility determinations of the district court. *Id.* at 1023.

The Third Circuit adopted a very different test in *Dreyer v. Arco Chemical Co.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906, 107 S. Ct. 1348 (1987). In that case, the court turned to the Restatement (Second) of Torts, sec. 908 (1979), and adopted "outrageousness" as an appropriate prerequisite for a finding of willfulness under ADEA. The court justified this test on two grounds—first, that it was the intention of Congress for liquidated damages to be punitive in nature; second, that Congress also intended to create a two-tiered liability scheme under ADEA. Since intentional wrongdoing is necessary for a finding of any violation at all, such a finding of intentional discrimination should logically be insufficient, standing alone, to warrant imposing punitive damages. *Id.* at 657-58.

The Tenth Circuit has rejected *Dreyer*, and adopted a "predominant factor" test, which requires a plaintiff seeking liquidated damages to prove that age was the predominant factor in the employer's decision. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988). The court stated that this approach preserved the two-tiered liability scheme, while avoiding the focus on an employer's "evil motive," which it felt was implicit in the *Dreyer* standard.

The Fourth and Eighth Circuits, while declining to adopt a precise test for willfulness, have stated that an employer's awareness of the statutory provisions when it takes an adverse employment action that is later found to have been based on an employee's age is not enough to establish a willful violation of ADEA. *Gilliam v. Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987); *Bethea v.*

Levi Strauss & Co., 827 F.2d 355 (8th Cir. 1987). The *Gilliam* court went on to state that a jury finding of an ADEA violation should not preclude consideration of the employer's business justification defense for purposes of determining willfulness under the statute. 820 F.2d at 1390.

The Eleventh Circuit has awarded liquidated damages where the jury found that the employer had intentionally failed to promote the plaintiff because of his age, and further found that the employer's articulated reason for its failure to promote was pretextual. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1099 (11th Cir. 1987). The defendant had admitted at trial that he knew that ADEA prohibited consideration of an employee's age in making employment decisions. While he denied that he did take age into account, the denial was not credited. Based on these facts, the Court of Appeals held that the plaintiff had satisfied the strictest prong of the *Thurston* willfulness standard by proving that the employer *knew* that his conduct violated ADEA. *Id.* at 1099, 1101. However, the Court of Appeals did leave open the possibility that another employer might have been able to avoid liability for liquidated damages if it could be shown that the employer had acted in good faith. *Id.* at 1100.

The Fifth Circuit took a similar approach in *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279 (5th Cir. 1986). In that case, the court held that the district court had improperly instructed the jury that a finding of willfulness would be proper if the defendant knew or reasonably should have known that its conduct was reasonably likely to violate ADEA. The court found that the "should have known" instruction was improper under *Thurston*. However, the court went on to conclude that the error was harmless, since the jury had specifically found that the employer had terminated the

plaintiff in retaliation for filing his ADEA claim, and that the employer's stated reason for the discharge was pretextual. The employer had testified that he knew retaliatory discharge was a violation of law and, again, his denial that he had done so was not believed. *Id.* at 286. Based on these findings, the Fifth Circuit concluded that the employer's conduct was at least "reckless," and therefore satisfied the standard of proof required by *Thurston*. Thus, in these circuits, every time a jury finds a violation of ADEA by a defendant who believes that age discrimination is illegal, willfulness exists—*i.e.*, in every case.

The Sixth Circuit has held that an employer is not liable for liquidated damages if it acted in good faith and had "reasonable grounds for believing" that its conduct would not violate the Act. *Whitfield v. City of Knoxville*, 756 F.2d 455 (6th Cir. 1985). In that case, the employer acted in reliance upon three district court decisions holding that the application of ADEA to state and local governments was barred by the Tenth Amendment to the United States Constitution. At the time of the employer's challenged actions, two circuits and numerous district courts had held that ADEA could constitutionally be applied to state and local governments. This Court resolved the issue in favor of the majority position in *EEOC v. Wyoming*, 460 U.S. 226 (1983), holding that ADEA was in fact constitutional as applied to state and local governments.

Given the split in the courts on this issue at the time of the employer's action, the Sixth Circuit concluded that the employer's reliance on the three district court cases was reasonable as a matter of law. 756 F.2d at 464. "To hold otherwise," stated the court, "would mean that a party always acts unreasonably in relying upon case law which, while arguably valid, adopts a distinctly minority position. It is beyond cavil that appellate courts, including the Supreme Court, sometimes adopt what

previously were minority positions." *Id.* The court also noted that the district court's factual finding that the employer had acted in good faith was not clearly erroneous. *Id.*

The Seventh Circuit holds that, in order to prove willfulness, a plaintiff must show that the defendant knew that its actions violated ADEA. *Coston v. Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir. 1988).

As the foregoing review of the case law demonstrates, this Court's decision in *Thurston* has provided insufficient guidance to the lower courts as to the proper standard and quantum of proof required to establish a willful violation of ADEA. The petition should be granted to resolve the resulting conflicts.

This Court should also grant the petition for *certiorari* in order to clarify the effect of communications with counsel on the existence of willfulness. In *Thurston*, this Court relied in part on the fact that TWA had consulted its attorneys, and had never been "advised by counsel that its new transfer policy discriminated against captains on the basis of age." *Id.* at 129. Since *Thurston*, the lower courts have split on the effect of communications with counsel. The decision of the district court in this case refused to give weight to the communications of EEOC counsel in prior litigation, which had indicated that the revisions made by Westinghouse in 1982 would eliminate any problems under ADEA. This ruling conflicts with a decision of the Tenth Circuit. That court has held that an employer is entitled (at least as concerns willfulness) to rely on statements made by persons charged with responsibility for enforcing compliance with federal legislation. *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1431 (10th Cir. 1985).

It is the position of *amici* that the holding of the Tenth Circuit on this issue represents the better-reasoned view. So long as an employer acts in good faith,

he should be entitled to rely upon the advice of counsel, whether private or public. Indeed, the fact that an employer has consulted with counsel and has been assured that his policies and programs are (or will be, subject to specific revisions) in full compliance with law should be dispositive on this issue, and such conduct should be recognized by this Court as a sufficient defense to allegations of willful misconduct.

In summary, the decisions of the lower courts since *Thurston* indicate a substantial degree of confusion on the part of the lower courts with respect to the type and quantum of proof required to establish a willful violation of ADEA. *Certiorari* should be granted to resolve this important issue, so that employers and courts alike will be able to determine what conduct may properly be found sufficient to warrant the imposition of liquidated damages under ADEA.

III. The petition for a writ of *certiorari* should be granted to determine whether an employer must show age-related cost factors in order to establish a 4(f)(2) defense under ADEA, and to clarify the grounds on which a finding of subterfuge may properly be based.

Section 4(f)(2) of ADEA exempts from ADEA's general prohibition of discrimination certain employee benefit plans, "such as a retirement, pension or insurance plan," that may differentiate based on age. The term "such as" makes the listing descriptive rather than all-inclusive. *Amicus* fully supports that portion of petitioner's brief, which contends that Westinghouse's policy is part of a single, coordinated benefit plan for purposes of ADEA. The question then becomes whether an employer must prove age-related costs in order to invoke the 4(f)(2) exemption, and whether the plan is a subterfuge to evade the purposes of ADEA.

As noted by the petitioner, the courts of appeals have been unable to resolve the issue of whether an employer must prove age-related cost justifications in order to establish a bona fide employee benefit plan that is exempt from the provisions of ADEA. This Court recently heard oral argument in *Public Employees Retirement System v. Betts*, No. 88-389 (U.S. argued Mar. 28, 1989), which presents the issue of whether an age-based benefit plan that denies disability benefits to older employees (who then must take length-of-service retirement) without cost-based business justifications violates ADEA, even if it existed before ADEA applied. 57 U.S.L.W. 3598 (Mar. 14, 1989).

Betts, however, does not present the issue of whether age-related cost justification is necessary to make out a 4(f)(2) defense where the challenged benefit program involves pension and severance benefits rather than disability benefits. For this reason, the petition should be granted in order to resolve the current split of authority in the lower courts on the issue of whether age-related costs must be shown in cases involving pension and severance benefits.

In any event, it is the position of *amicus* that the age-related cost justification theory is unreasonable as a matter of law, since it is irreconcilable with Section 4(f)(2)'s language, its legislative history, and its congressional purpose.

An age-related cost justification requirement cannot be derived from, and indeed is inconsistent with, the language of the statute. Section 4(f)(2) unequivocally states that it "shall not be unlawful for an employer . . . to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [ADEA]. . . ." 29 U.S.C. 623(f)(2). The term "any" means "one or another without restriction or exception . . .: All." *Websters II Riverside University Dictionary* 115

(1984). The phrase "employee benefit plan" is commonly understood—and was commonly understood in 1967—to encompass many fringe benefit systems that are without an age-related cost justification, including certain types of severance pay, sick leave, and unemployment compensation schemes. *See, e.g.,* 29 U.S.C. §1002 (ERISA's definition of "employee benefit plan").[1] Indeed, the phrase "employee benefit plan" is commonly understood to encompass various retirement, pension, and insurance plans that are without age-related cost justifications. *See, e.g., Alford v. City of Lubbock,* 664 F.2d 1263, 1267-71 (5th Cir. 1982), *cert. denied,* 456 U.S. 975 (1982) (defined contribution pension plan); *Brennan v. Taft Broadcasting Co.,* 500 F.2d 212, 215-217 (5th Cir. 1974) (profit-sharing retirement plan). The term "subterfuge" conventionally refers only to the subjective intent behind the adoption of a plan or a provision thereof; it does not refer to objective considerations such as those the age-related cost justification theory demands. *Accord, EEOC v. County of Orange,* 837 F.2d 420, 422-23 (9th Cir. 1988); *EEOC v. State of Maine,* 644 F. Supp. 223, 226 (D. Me. 1986), *aff'd mem.* 823 F.2d 542 (1st Cir. 1987); *Germann v. Levy,* 553 F. Supp. 700, 703 n.9 (N.D. Ill. 1982). In short, the language of Section 4(f)(2) does not allow the exemption properly to be limited only to plans and plan provisions with age-related cost justifications. *See, Lorillard v. Pons,* 434 U.S. 575, 581 (1978) (courts interpreting ADEA should assume Congress intended words to have their ordinary meaning).

The legislative history of Section 4(f)(2) confirms that Congress meant precisely what the language of the exemption says—that the terms of any bona fide

[1] *See also* 40 U.S.C. §276 (definition of "bona fide fringe benefits" in Davis-Bacon Act); 41 U.S.C. §351 (definition of "fringe benefits" in Service Contract Labor Standards Act of 1965); 29 U.S.C. §207(e) (listing "fringe benefits" excluded from regular wage rate calculation under Fair Labor Standards Act). *See, generally,* M. Wermel & G. Beideman, *Employee Benefit Programs* 1-4, 17-19, 23-31 (1957); American Management Association, *Employee Benefits* 23-25 (1958); M. Greene, *The Role of Employee Benefit Structures in Manufacturing Industry* 20-23, 103-110 (1964).

employee benefit plan are enforceable. The original bills proposed in the House and Senate in 1967 did not contain the broad language now set forth in Section 4(f)(2). Instead, those first bills exempted only involuntary retirement terms. *See,* S. 830, 90th Cong., 1st Sess. (1967); H.R. 4221, 90th Cong. 1st Sess. (1967). Subsequently, Congress became concerned that, as written, the proposed legislation would disrupt many existing benefit plans—retirement, insurance, and otherwise.

Senator Javits, the minority floor manager of the Senate bill, proposed, and Congress eventually enacted with some modification, the language now in Section 4(f)(2) of the statute. Senator Javits assured his colleagues that this language would serve as a "fairly broad exemption . . . for bona fide retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." Senate Hearings, at 28. Senator Javits wanted all barriers to the hiring of older workers removed, and in his opinion, the exemption of all employee benefit plan terms, except those limiting the right of older workers to be hired, from ADEA's prohibitions was necessary to achieve this purpose. *See id.; see also id.,* at 40 (testimony of Secretary Wirtz confirming this understanding).

Congress' reason for exempting *all* terms of covered plans is clear from the legislative record. "Congress was only too aware of the danger involved in drastically altering, in one barely considered proviso, the [employee benefit] plans already operative in 1967." *Alford v. City of Lubbock,* 664 F.2d at 1270. Thus, Senator Javits stated that "the age discrimination law [was not] . . . the place to fight the pension battle . . ." (Senate Hearings, at 27), and reiterated that he had recently introduced another bill comprehensively to deal with the benefit plan problem. (*Ibid.*). This other bill, which was a precursor of ERISA, expressly defined the term

"employee benefit plan" to include "any plan providing for the payment of . . . benefits [such as] unemployment benefits or . . . severances or similar benefits . . . ." S. 1103, 90th Cong., 1st Sess. §2(3), (4) (1967). In short, it is quite clear that the enacting Congress understood the term "employee benefit plan" to have a broad scope—which included separation pay plans—and that it used this term in order to prevent ADEA from unnecessarily disrupting the many different plans used by employers. *See* Senate Hearings at 28; 113 Cong. Rec. 31255 (1967) (remarks of Senator Yarborough); 113 Cong. Rec. 34740 (1967) (remarks of Representative Perkins).

By limiting the 4(f)(2) exemption to cost-justifiable plans, the courts would reestablish barriers to the hiring of older workers, and disrupt existing benefit plans—all against Congress' stated purpose.

The petition should also be granted in order to clarify the standard of proof required to establish that an otherwise valid employee benefit plan is not protected by Section 4(f)(2), because it is a "subterfuge to evade the purposes" of the Act. 29 U.S.C. §623(f)(2). The purposes of ADEA, as established by Congress, are:

> . . . to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. §621(b).

This Court has stated that "subterfuge" in Section 4(f)(2) must be given its "ordinary meaning." *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977).

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion.

434 U.S. at 203. The burden is on the employer to establish that the policy or program at issue is not a subterfuge to evade the purposes of the Act. *Cipriano v. Board of Educ.*, 785 F.2d 51, 58 (2d Cir. 1986).

Some courts have found that in the absence of evidence that the employer acted "in bad faith or with an age-discriminatory motive," the "mere fact that plaintiffs would have fared better under a different scheme" is insufficient to show that the system is a subterfuge under Section 4(f)(2). *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 644 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986); *See also Potenze v. New York Shipping Ass'n, Inc.*, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987). On remand, the district court in *Cook v. Pan American World Airways* found that a showing of a legitimate business reason was sufficient to show that the employer's seniority system was not a subterfuge. *Cook v. Pan American World Airways, Inc.*, 647 F. Supp. 816, 825 (S.D.N.Y. 1986), *aff'd per curiam*, 817 F.2d 1030 (2d Cir.), *cert. denied*, _____ U.S. _____, 108 S. Ct. 259 (1987). *See also Cipriano v. Bd. of Educ., supra*, 785 F.2d at 58. The Fourth Circuit has similarly held that an employer may disprove subterfuge by showing that the challenged policy "was motivated by a legitimate business or economic purpose which, objectively assessed, reasonably justified it." *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 215 (4th Cir. 1982). The decision below is simply inconsistent with these decisions. That conflict should be resolved by this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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